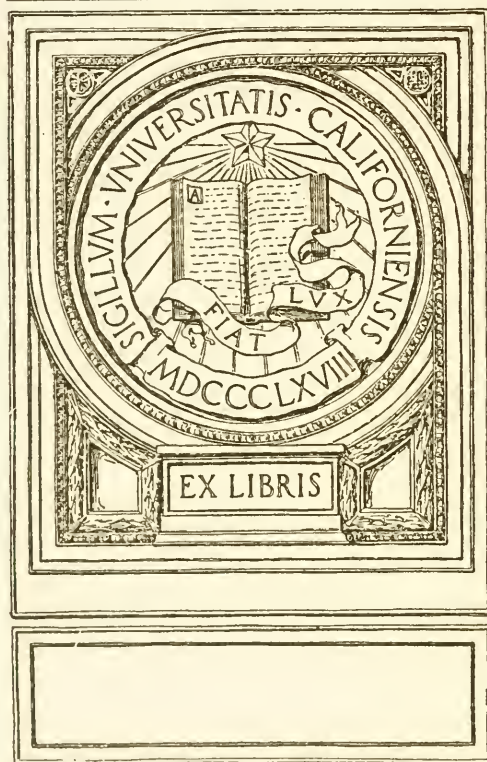




UNIVERSITY OF CALIFORNIA  
AT LOS ANGELES





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A TREATISE  
ON THE  
LAW OF INJUNCTIONS

BY  
JAMES L. HIGH

FOURTH EDITION  
REVISED AND GREATLY ENLARGED

BY  
SHIRLEY T. HIGH  
OF THE CHICAGO BAR

IN TWO VOLUMES  
VOL. I

CHICAGO  
CALLAGHAN AND COMPANY  
1905



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The jurisdiction of courts of equity by the writ of injunction, though of English origin, is largely the result of American growth and development. Perhaps no branch of equity jurisprudence owes more to the decisions of American courts, and the growing frequency of the use of this writ, of late years, has invested the subject with a new importance. Of the more recent text-books upon the Law of Injunctions, that of Mr. Hilliard, professing to be purely American, contains, of course, but few citations of English cases, while the English treatises of Mr. Kerr and Mr. Joyce, though complete and exhaustive so far as regards the English authorities, contain but few references to the opinions of our courts, and leave the rich field of American decisions almost untouched. And the fact that very many of the English authorities, noticeably those of recent date, are modified by statutes which are inapplicable here, has seemed to the author to create an additional necessity for a work which should be based upon the decisions of both countries, and which should present the general principles governing courts of equity, both in England and America, in the administration of preventive relief.

In the preparation of this work, the cases cited have been carefully and patiently studied, from beginning to end, without regard to the head notes, and the author has constantly endeavored to present the principles underlying the actual decisions of the courts upon the points actually involved in the cases. To analyze and weigh these decisions, and to deduce therefrom the principles underlying them all, is the work which he has attempted. Believing it to be the proper function

of legal authorship to state the law as it is, rather than as it ought to be, he has studiously refrained from the obtrusion of his own theories, not merely because they would carry little weight of themselves, but because in these days of multiplied book making, the tendency among lawyers is to use text-books merely as guide-posts to direct them to the fountain-head of our jurisprudence, the reports. But he has written in the firm conviction that the beneficent system of equity, whose "strong right arm" constitutes the subject-matter of this work, is destined to outlive the iconoclasm of modern law reformers and codifiers, and to constitute for all time an integral part of our jurisprudence. That his work is without blemishes, he has not dared to hope; but that it will be found to have some merits, he confidently believes, otherwise it would never have been submitted to the verdict of a critical profession.

J. L. H.

CHICAGO, January 1, 1873.

## PREFACE TO SECOND EDITION

---

The rapid growth of the law of injunctions has rendered a new edition of this work necessary. Nearly twenty-three hundred new cases have been embodied in the present edition, including the latest decisions of the English, Irish and American courts. Several new chapters have been added, the entire work has been re-arranged, and much of it has been re-written, to conform to the existing state of the law. These changes have rendered it necessary to abandon the numbering of the sections of the former edition, but whatever inconvenience in citation may be thus caused, will, it is hoped, be counterbalanced by the more convenient arrangement of the different chapters and subdivisions. The work has been done under the pressure of an active practice, and the author can not hope to have attained such satisfactory results as might have been possible under more favorable conditions. Nevertheless, he has spared no pains to insure accuracy and thoroughness in his work. More freedom has been used in the expression of individual opinion, and in the criticism of doubtful authorities, than in the former edition; but whether the work, as a whole, has been thus improved, remains for the profession to determine.

J. L. H.

CHICAGO, December, 1880.

## PREFACE TO THIRD EDITION

---

The second edition of this work was published in December, 1880. More than fourteen hundred cases upon the topics of which it treats have since appeared in the published reports and are embodied in the present edition. While the general plan and arrangement of the work remain unchanged, considerable modifications of former statements have been rendered necessary, and more than two hundred pages have been added to the text.

J. L. H.

CHICAGO, January, 1890.



## PREFACE TO FOURTH EDITION

---

It was the intention of the author of this work, after the publication of the third edition in 1890, to make no further revision of the work himself. During the later years of his life it was his desire to leave to the present editor the task of preparing any future editions which might from time to time become necessary. It is in the consummation of this wish, as well as because of the recent rapid growth of the law of injunctions, that the fourth edition is now presented.

While there has been, of recent years, a wide development of the preventive jurisdiction of equity in all its branches, this development has been especially noticeable in connection with injunctions against the infringement of trade marks, including what has come to be known as unfair competition, injunctions pertaining to streets and highways, and to negative covenants and contracts in restraint of trade, and, finally, the use of the writ which has resulted from the labor troubles and disturbances of the last decade. The growth of the law in the three branches enumerated would alone be sufficient to justify a new edition of this work.

In bringing out the present edition, the editor has endeavored, both in the preparation of the work and in the presentation of the subject, to follow as closely as possible along the lines adhered to by the author. Numerous modifications of the former text have been rendered necessary, and in several instances the text has been entirely re-written. Nearly twenty-

three hundred cases have been added to the work, making a total of about eighty-five hundred authorities now cited. Three hundred and ninety pages have been added to the text exclusive of the table of cases and the index. Of this additional matter, about one-third is represented by new sections. The section numbering remains unchanged, the new sections, of which there are over one hundred and forty, being indicated by lettering.

SHIRLEY T. HIGH.

CHICAGO, 1905.

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# THE LAW OF INJUNCTIONS.

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## CHAPTER I.

### OF THE DEFINITION AND NATURE OF THE REMEDY.

- § 1. Definition.
- 2. Mandatory injunctions; *mandamus* distinguished.
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- 43. Restrictions upon jurisdiction of the courts; prohibition; powers of United States district judge.
- 44. Supreme Court of Judicature Act in England.

§ 1. **Definition.** A writ of injunction may be defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing.<sup>1</sup> In its broadest sense the process is

<sup>1</sup> *McDonogh v. Calloway*, 7 Rob. p. 307. Story defines it as "a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ." 2 Story's Eq., § 861. Again, it has been said to be "a prohibitory writ, granted by a court of equity (in the nature of an *interdictum* in the civil law),

restorative as well as preventive, and it may be used both in the enforcement of rights and in the prevention of wrongs.<sup>2</sup> In general, however, it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process.<sup>3</sup> If the injury be already committed, the writ can have no operation to correct it, and equity will not interfere for purposes of punishment, or to compel persons to do right, but only to prevent them from doing wrong.<sup>4</sup> Nor will a court of equity lend its aid by injunction for the enforcement of right or the prevention of wrong in the abstract, and unconnected with any injury or damage to the person seeking the relief.<sup>5</sup>

§ 2. **Mandatory injunctions; mandamus distinguished.** Injunctions are known as mandatory or preventive, according as they command defendant to do or to refrain from doing a particular thing. While the jurisdiction of equity by way of mandatory injunction is rarely exercised, and while its existence has even been questioned, it is nevertheless too

and which may be obtained in a variety of cases to restrain the adverse party in the suit from committing any acts of violation of the plaintiff's rights, as to stay proceedings at law, to restrain the negotiation of notes and other securities, to restrain from committing waste or nuisance, or from infringing a patent or copyright." Burr. Law Dict. So it has been defined as "a prohibitory writ, specially prayed for by a bill, in which the plaintiff's title is set forth, restraining a person from committing or doing an act (other than criminal acts) which appears to be against equity and conscience." Bouv. Law Dict.

<sup>2</sup> McDonogh v. Calloway, 7 Rob. (La.), 442.

<sup>3</sup> Attorney-General v. New Jersey R. R. & T. Co., 2 Green Ch., 136; Washington University v. Green, 1 Md. Ch., 97; Sherman v. Clark, 4 Nev., 138; Blakemore v. Glamorganshire, 1 Myl. & K., 154. The remedy for injuries already committed, though sometimes given as an incident to an injunction, is only allowed where a sufficient showing for the injunction is made out and the injury has resulted from the act enjoined. Sherman v. Clark, 4 Nev., 138.

<sup>4</sup> Attorney-General v. New Jersey R. R. & T. Co., 2 Green Ch., 136; Bosley v. Susquehanna Canal 3 Bland, 63.

<sup>5</sup> Goodrich v. Moore, 2 Minn., 61.

firmly established to admit of doubt.<sup>6</sup> Mandatory injunctions are seldom allowed before a final hearing,<sup>7</sup> although they may be granted on interlocutory applications.<sup>8</sup> And while a court of equity is always reluctant to grant a mandatory injunction upon an interlocutory application and before final hearing, it may yet do so in an extreme case when the right is clearly established and the invasion of the right results in

<sup>6</sup> *Garretson v. Cole*, 1 Har. & J., 370; *Krehl v. Burrell*, 7 Ch. D., 551; *Robinson v. Byron*, 1 Bro. C. C., 588; *Hervey v. Smith*, 1 Kay & J., 392; *Martyr v. Lawrence*, 2 De Gex, J. & S., 261; *Home & Colonial Stores v. Colls* (1902), 1 Ch., 302; *Corning v. Troy Factory*, 40 N. Y., 191, affirming S. C., 34 Barb., 485, 39 Barb., 311; *Foot v. Bronson*, 4 Lans., 47; *Whitecar v. Michenor*, 37 N. J. Eq., 6; *Hunt v. Sain*, 181 Ill., 372, 54 N. E., 970; *Brauns v. Glesige*, 130 Ind., 167, 29 N. E., 1061; *Sproat v. Durland*, 2 Okla., 24, 35 Pac., 682, 886; *Woodruff v. Wallace*, 3 Okla., 355, 41 Pac., 357; *Calhoun v. McCornack*, 7 Okla., 347, 54 Pac., 493; *Glover v. Swartz*, 8 Okla., 642, 58 Pac., 943; *McDonald v. Brady*, 9 Okla., 660, 60 Pac., 509; *Battalion Westerly Rifles v. Swan*, 22 R. I., 333, 47 Atl., 1090, 84 Am. St. Rep., 849; *Condon v. Maloney*, 108 Tenn., 82, 65 S. W., 871. And see observations of Lord Justice Turner in *Durrell v. Pritchard*, L. R. 1 Ch., 244. In *Battalion Westerly Rifles v. Swan*, *supra*, a mandatory injunction was granted to compel the defendant to surrender to plaintiff chattels of a peculiar and especial value not ascertainable in money.

<sup>7</sup> *Gale v. Abbot*, 8 Jur. N. S.,

987; *Bailey v. Schnitzius*, 45 N. J. Eq., 178, 16 Atl., 680; *Hagen v. Beth*, 118 Cal., 330; 50 Pac., 425. And see *Washington University v. Green*, 1 Md. Ch., 97; *Rogers L. & M. Works v. Erie R. Co.*, 5 C. E. Green, 379; *Andenried v. Philadelphia & R. R. Co.*, 68 Pa. St., 370; *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq., 21, 10 Atl., 872; *Dela-ware, L. & W. R. Co. v. Central S. T. & T. Co.*, 43 N. J. Eq., 77, 10 Atl., 602; *Black v. Good Intent Tow-boat Co.*, 31 La. An., 497.

<sup>8</sup> *Robinson v. Byron*, 1 Bro. C. C., 588; *Hervey v. Smith*, 1 Kay & J., 392; *Von Joel v. Hornsey* (1895), 2 Ch., 774, 65 L. J. N. S. Ch., 102; *New Iberia Rice Milling Co. v. Romero*, 105 La., 439, 29 So., 876; *Central Trust Co. v. Moran*, 56 Minn., 188, 57 N. W., 471, 29 L. R. A., 212; *Reeves v. Oliver*, 3 Okla., 62, 41 Pac., 353; *Henderson v. Ogden C. R. Co.*, 7 Utah, 199, 26 Pac., 1119; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 730; *Same v. Same*, Ib., 746; *Chattanooga Terminal Ry. v. Felton*, 69 Fed., 273. In *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, *supra*, at page 741, Judge Taft uses the following language: "The office of a preliminary injunction is to preserve the status quo until, upon



serious injury.<sup>9</sup> And where, upon an interlocutory application, it is clear that the plaintiff will be entitled to a final mandatory injunction, an interlocutory mandatory injunction may be allowed.<sup>10</sup> And when there is a wilful and unlawful invasion of plaintiff's right, against his protest and remonstrance, the injury being a continuing one, a mandatory injunction may be granted in the first instance.<sup>11</sup> It is to be observed, however, that courts of equity rarely interfere to command the doing of a positive act, but the same result is obtained by framing the injunction in an indirect form and prohibiting the defendant from doing the reverse of what he is desired to do.<sup>12</sup> Even then the jurisdiction is exercised with extreme caution, and is confined to cases where the courts of law are unable to afford adequate redress, or where the injury can not be compensated in damages.<sup>13</sup> And in determining whether to grant relief by

final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits." See, *contra*, *Catholicon Hot Springs Co. v. Ferguson*, 7 S. Dak., 503, 64 N. W., 539.

<sup>9</sup> *Whitecar v. Michenor*, 37 N. J. Eq., 6.

<sup>10</sup> *Central Trust Co. v. Moran*, 56 Minn., 188, 57 N. W. 471, 29 L. R. A. 212.

<sup>11</sup> *Broome v. New York & N. J.*

*Co.*, 42 N. J. Eq., 141, 7 Atl., 851; *Pokegama Lumber Co. v. Klamath Lumber Co.*, 86 Fed., 538.

<sup>12</sup> *Lane v. Newdigate*, 10 Ves., 192; *Cooke v. Chilcott*, 3 Ch. D., 694; *Mexborough v. Bower*, 7 Beav., 127; *Central Trust Co. v. Moran*, 56 Minn., 188, 57 N. W., 471, 29 L. R. A. 212; *Henderson v. Ogden C. R. Co.*, 7 Utah, 199, 26 Pac., 1119; *Sedalia Brewing Co. v. Sedalia W. Co.*, 34 Mo. App., 49. See also *Cole Co. v. Virginia Co.*, 1 Sawy., 470; S. C., *Ib.*, 685; *Reeves v. Oliver*, 3 Okla., 62, 41 Pac., 353. But see, *contra*, *Akrill v. Selden*, 1 Barb., 316; *Jackson v. Normanby Brick Co.*, (1899) 1 Ch., 438.

<sup>13</sup> *Isenberg v. East India H. E. Co.*, 33 L. J. Ch., 392; *Deere v. Guest*, 1 Myl. & Cr., 516; *Gardner v. Stroeve*, 81 Cal., 148, 22 Pac., 483, 6 L. R. A., 90.

way of mandatory injunction courts of equity will take into consideration the relative convenience and inconvenience which would result to the parties from granting or withholding the relief, and will be governed accordingly.<sup>14</sup> Although in states where the distinction between law and equity has been abolished, a mandatory injunction and a writ of *mandamus* can not be distinguished, yet in those jurisdictions where the long established distinction still prevails, prohibitory injunction and *mandamus* are not correlative writs, the one restraining action where the other compels it and both applicable to the same subject matter. Injunctions are granted only by courts of equity and only in cases of equitable cognizance according to the established principles of equity jurisdiction, while writs of *mandamus* emanate only from courts of law in cases which are of a purely legal nature.<sup>15</sup>

§ 3. **Interlocutory and perpetual injunctions; temporary restraining orders.** With reference to their duration, injunctions are known as interlocutory and perpetual. Interlocutory or preliminary injunctions are such as are granted at any time before final hearing, generally upon the filing of the bill, and continue until the coming in of the answer, or until a hearing upon the merits, or the further order of the court. Perpetual injunctions are granted only at a final hearing upon the merits, and usually form a part of the final decree. Indeed, a perpetual injunction is in effect a decree of the court whereby defendant is perpetually inhibited from the assertion of an assumed right, or perpetually restrained from the commission of an act which would be contrary to equity

<sup>14</sup> *Isenberg v. East India H. E. Co.*, 33 L. J. Ch., 392; *Flippin v. Knaffle*, 2 Tenn. Ch., 238. And a mandatory injunction has been refused, the purpose of which was to compel a landlord to comply with a covenant to repair the demised premises. *Jarvis v. Henwood*, 10 C. E. Green, 460.

<sup>15</sup> *Fletcher v. Tuttle*, 151 Ill., 41, 37 N. E., 683, 25 L. R. A., 143.

and good conscience.<sup>16</sup> While, therefore, an interlocutory injunction, being merely provisional in its nature, does not conclude a right, a perpetual injunction, being a final decree upon a full hearing, is conclusive upon all parties in interest. A temporary restraining order is distinguished from an interlocutory injunction in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction and its life ceases with the disposition of that motion and without further order of the court, while, as we have seen, an interlocutory injunction is usually granted until the coming in of the answer or until the final hearing of the cause and stands as a binding restraint until rescinded by the further action of the court.<sup>17</sup>

§ 4. **Object of interlocutory injunction.** The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. It can not be used for the purpose of taking property out of the possession of one party and putting it into the possession of another, nor does it go to the extent of ordering defendant to undo what he has already done, since it might thereby be productive of as much injury to defendant as that of which the party aggrieved complains.<sup>18</sup> The juris-

<sup>16</sup> See *Gilb. Forum Roman.*, ch. 11. But an injunction will not be perpetuated against a party, without having him before the court. *Chapman v. Harrison*, 4 Rand., 336. And it is error for an inferior court to award a perpetual injunction upon the same facts upon which the court of last resort of the state has already reversed an interlocutory injunction in the cause. *Thorne v. Sweeney*, 13 Nev., 415.

<sup>17</sup> *Miles v. Sheep Rock M. & M. Co.*, 15 Utah, 436, 49 Pac., 536; *State v. Baker*, 62 Neb., 840, 88 N. W., 124. And see *Wetzstein v. B. & M. etc. Co.*, 25 Mont., 135, 63 Pac., 1043; *Maloney v. King*, 25 Mont., 256, 64 Pac., 688; *Riggins v. Thompson*, 96 Tex., 154, 71 S. W., 14.

<sup>18</sup> *Murdock's Case*, 2 Bland, 461; *Bosley v. Susquehanna Canal*, 3 Bland, 63; *Farmers R. Co. v. Reno O. C. & P. R. Co.*, 53 Pa. St., 224;

diction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters *in statu quo*.<sup>19</sup> And where the granting of an interlocutory injunction involves the decision of a novel question of law of grave importance and serious difficulty, the injunction should be denied.<sup>20</sup> And the court should not, upon an interlocutory application, enter a final decree granting a perpetual injunction.<sup>21</sup>

§ 5. **Interlocutory injunction not decisive upon the merits.**

It is to be constantly borne in mind that in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing, and indeed without

Washington University *v.* Green, 1 Md. Ch., 97; Audenried *v.* Philadelphia & R. R. Co., 68 Pa. St., 370; Fredericks *v.* Huber, 180 Pa. St., 572, 37 Atl., 90; Dickson *v.* Dows, 11 N. Dak., 404, 92 N. W., 797; Minneapolis & S. L. R. Co. *v.* C., M. & St. P. R. R. Co., 116 Iowa, 681, 88 N. W., 1082; Southern Pac. R. Co. *v.* City of Oakland, 58 Fed., 50; Calvert *v.* State, 34 Neb., 616, 52 N. W., 687.

<sup>19</sup> Blakemore *v.* Glamorganshire, etc., 1 Myl. & K., 154. The principle upon which the jurisdiction is exercised is clearly stated in this case by Brougham, chancellor, as follows: "The leading principle, then, on which I proceed in deal-

ing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is, that only such a restraint shall be imposed as may suffice to stop the mischief complained of where it is to stay a further injury, to keep things as they are for the present."

<sup>20</sup> Fritz *v.* Erie City P. Ry., 155 Pa. St., 472, 26 Atl., 653; Smith *v.* Reading C. P. Ry., 156 Pa. St., 5, 26 Atl., 779.

<sup>21</sup> Gross *v.* Wieand, 151 Pa. St., 639, 25 Atl., 50.

having the means of forming a final opinion as to such rights. And in order to sustain an injunction for the protection of property *pendente lite* it is not necessary to decide in favor of plaintiff upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing, since he may be entitled to an interlocutory injunction, although his right to the relief prayed may ultimately fail.<sup>22</sup> Nor is the decision of the court in granting or refusing a preliminary injunction conclusive upon either the court or parties on the subsequent disposition of the cause by final decree.<sup>23</sup> The court will not, however, upon an application for an interlocutory injunction, shut its eyes to the question of the probability of plaintiff ultimately establishing his demand, nor will it by injunction disturb defendant in the exercise of a legal right without a probability that plaintiff may finally maintain his right as against that of the defendant.<sup>24</sup> And where the question involved is merely of a pecuniary nature, plaintiff will not be allowed an interlocutory injunction unless he can satisfy the court that there is a probability that his bill will not be dismissed upon the hearing.<sup>25</sup>

§ 5 *a*. **Interlocutory injunction should preserve the status quo.** Since the object of a preliminary injunction is to preserve the *status quo*, the court will not grant such an order where its effect would be to change the *status*. Thus, where the plaintiff seeks to enjoin the defendant from interfering

<sup>22</sup> Great Western R. Co. v. Birmingham R. Co., 2 Ph., 597; Flip-  
pin v. Knaffle, 2 Tenn. Ch., 238;  
Helm v. Gilroy, 20 Ore., 517, 26  
Pac., 851; United States E. L. Co.  
v. Metropolitan Club, 6 App. D. C.,  
536; Buskirk v. King, 18 C. C. A.,  
418, 72 Fed., 22; Jensen v. Norton,  
12 C. C. A., 608, 64 Fed., 662. And  
see Asheville St. Ry. Co. v. City of

Asheville, 109 N. C., 688, 14 S. E.,  
316.

<sup>23</sup> Andrae v. Redfield, 12 Blatch.,  
407.

<sup>24</sup> Clayton v. Attorney-General, 1  
Coop. t. Cottenham, 97; Wilkinson  
v. Dobbie, 12 Blatch., 298.

<sup>25</sup> Attorney-General v. Mayor, 5  
De G., M. & G., 52, affirming S. C.,  
Kay, 268.



with acts about to be done by the plaintiff against the objection of the defendant, a preliminary injunction restraining such interference is erroneous since its effect is to destroy the existing condition of the subject-matter of the suit by permitting the doing of affirmative acts by the plaintiff in advance of the final determination of his right to do them.<sup>26</sup> And in such case the court may compel the plaintiff who, after having tied defendant's hands, has thus changed the *status* of affairs, to restore them to the same condition in which they were before the injunction was granted.<sup>27</sup> And by the *status quo* which will be preserved by preliminary injunction is meant the last actual, peaceable, noncontested condition which preceded the pending controversy, and equity will not permit a wrong-doer to shelter himself behind a suddenly and secretly changed *status*, although he succeeded in making the change before the hand of the chancellor has actually reached him.<sup>28</sup> And where, before the granting of the injunction, the defendant has thus changed the condition of things, the court may not only restrain further action by him, but may also, by preliminary mandatory injunction, compel him to restore the subject-matter of the suit to its former condition. And in so doing the court acts without any regard to the ultimate merits of the controversy.<sup>29</sup>

§ 6. **Common and special injunctions.** Interlocutory injunctions are also distinguished as common and special, although in modern times the distinction is of little practical importance. The common injunction is granted in aid of or secondary to another equity, as in the case of an injunction to a judgment at law, and is frequently issued as of course upon

<sup>26</sup> *Chester Traction Co. v. Philadelphia W. & B. R. Co.*, 174 Pa. St., 284, 34 Atl., 619.

<sup>27</sup> *Lake Shore & M. S. Ry. Co. v. Taylor*, 134 Ill., 603, 25 N. E., 588. In *Johnson v. Hall*, 83 Ga., 281, 9

S. E. 783, the court entertained a cross-bill restraining further action by complainant.

<sup>28</sup> *Williams, J.*, in *Fredericks v. Huber*, 180 Pa. St., 572, 37 Atl., 90.

<sup>29</sup> *Daniel v. Ferguson*, (1891) 2



the coming in of the bill stating a sufficient case for the relief, without notice to the opposite party. Special injunctions are granted for the prevention of irreparable injury, as in cases of waste, where the preventive aid of equity is the ultimate and only relief sought. They are generally granted upon notice to the defendant, as in cases of injunction for the infringement of patents, and are not allowed as of course upon the coming in of the bill.<sup>30</sup> Injunctions in the courts of the United States, being usually granted only upon notice to the opposite party, are regarded as falling within the class of special injunctions, and when resisted under the notice they will not be granted except upon a strong showing of irreparable injury.<sup>31</sup>

§ 7. **Bill should show some primary equity; plaintiff must not be guilty of laches.** Except in cases of special injunctions to stay waste or prevent other irreparable injury, the bill should generally show some primary equity in aid of which the injunction is asked, and the relief is granted as ancillary to or in support of the primary equity whose enforcement is thus sought.<sup>32</sup> And it is incumbent upon the party seeking relief by interlocutory injunction to show some clear legal or equitable rights,<sup>33</sup> and a well grounded apprehension of immediate injury to those rights.<sup>34</sup> So it is requisite that a complainant seeking the aid of a court of equity by injunction shall not

Ch., 27; *Von Joel v. Hornsey*,  
(1895) 2 Ch., 774, 65 L. J. N. S.  
Ch., 102.

<sup>31</sup> *Perry v. Parker*, 1 Woodb. &  
M., 280.

<sup>30</sup> See, as to distinction between  
common and special injunctions,  
*Woodworth v. Rogers*, 3 Woodb.  
& M., 135; *Purnell v. Daniel*, 8  
Ired. Eq., 9; *Troy v. Norment*, 2  
Jones Eq., 318; *Peterson v.*  
*Matthis*, 3 Jones Eq., 31; *Chad-*  
*well v. Jordan*, 2 Tenn. Ch., 635;  
*Patterson v. Gordon*, 3 Tenn. Ch.,  
18. But see *Anderson v. Noble*, 1  
Drew., 143; *Magnay v. Mines Roy-*  
*al Co.*, 3 Drew., 130.

<sup>32</sup> *Patterson v. Miller*, 4 Jones  
Eq., 451; *Washington v. Emery*,  
Ib., 29; *Scofield v. Bokkelen*, 5  
Jones Eq., 342; *McRae v. Atlantic*  
& N. C. R. Co., Ib., 395.

<sup>33</sup> *Scott v. Burton*, 2 Ashm., 312;  
*McGinnis v. Friedman*, 2 Idaho,  
393, 17 Pac., 635.

<sup>34</sup> *Kean v. Colt*, 1 Halst. Ch., 365.  
For an interesting discussion of the  
doctrine of "irreparable injury"  
as applied to applications for relief  
by interlocutory injunction, see

have been guilty of laches or delay in the assertion of his rights; for, while delay may not amount to proof of acquiescence in the wrong for which he seeks redress, it may yet suffice to prevent his obtaining relief by injunction.<sup>35</sup> And where, in addition to plaintiff's delay in pressing his suit to final hearing, it appears that the benefit resulting to him from the granting of a final injunction will be entirely disproportionate to the injury to the defendant and to the public resulting therefrom, the relief will be denied and he will be remitted to his legal remedy for the vindication of his rights.<sup>36</sup> And especially will laches constitute a bar to equitable relief by injunction where public interests would be prejudiced by the granting of the writ and in such case a very slight delay upon the part of the suitor will deprive him of the right to invoke the aid of the court.<sup>37</sup> But where, although the plaintiff has suffered a long time to elapse before finally seeking the aid of a court of equity, he has during all this time frequently protested to the defendant and urged him to cease doing the acts sought to be enjoined, the doctrine of laches does not apply and such delay will not constitute a bar to the interposition of the court by injunction.<sup>38</sup>

### § 8. Relief not usually granted when legal right in doubt.

The writ of injunction, being largely a preventive remedy, will not ordinarily be granted where the parties are in dispute concerning their legal rights, until the right is established at law.<sup>39</sup> And if the right for which protection is sought

*Commonwealth v. Pittsburgh & C. R. Co.*, 24 Pa. St., 159.

<sup>35</sup> *Dulin v. Caldwell*, 28 Ga., 117; *Attorney-General v. Sheffield G. C. Co.*, 3 De Gex, M. & G., 304; *Muncey v. Joest*, 74 Ind., 409; *Heilman v. L. & A. S. R. Co.*, 175 Pa. St., 188, 34 Atl., 637; *Nesinger v. C. & H. T. Co.*, 203 Pa. St., 265, 52 Atl., 197; *Stewart Wire Co. v. L. C. & N. Co.*, 203 Pa. St., 474, 53 Atl., 352.

<sup>36</sup> *Becker v. L. & M. S. Ry. Co.*, 188 Pa. St., 484, 41 Atl., 612; *Fisk v. City of Hartford*, 70 Conn., 720, 40 Atl., 906, 66 Am. St. Rep., 147.

<sup>37</sup> *Keeling v. P., V. & C. R. Co.*, 205 Pa. St., 31, 54 Atl., 485; *Clark v. C. & A. I. & I. Co.*, 45 Neb., 798, 64 N. W., 239.

<sup>38</sup> *Lonsdale Co. v. City of Woonsocket*, 21 R. I., 498, 44 Atl., 929.

<sup>39</sup> *Hart v. Mayor of Albany*, 3

is dependent upon disputed questions of law which have never been settled by the courts of the state, and concerning which there is an actual and existing dispute, equity will withhold relief until the questions of law have been determined by the proper courts.<sup>40</sup> Where, however, the parties are at issue upon a question of legal right and it is necessary to preserve their rights *in statu quo* until the determination of the controversy, an interlocutory injunction may properly be allowed.<sup>41</sup> In such cases courts of equity do not assume jurisdiction to dispose of the legal rights in controversy, but confine themselves to protecting those rights as they then are, pending an adjudication upon the legal questions involved.<sup>42</sup> And it is proper to accompany an injunction granted under such

Paige, 213; Mammoth Vein Co.'s Appeal, 54 Pa. St., 183. And see *Perry v. Parker*, 1 Woodb. & M., 280; *Chesapeake, O. & C. Co. v. Young*, 3 Md., 480; *Mayor v. Cardiff Water-works Co.*, 4 De Gex & J., 596; *Muir v. Howell*, 37 N. J. Eq., 39. In *Mammoth Vein Coal Co.'s Appeal*, 54 Pa. St., 183, which was a bill for an injunction where parties claimed under different leases of the same coal veins, the relief was denied, the court, Thompson, J., saying: "It ought not to be forgotten that a preliminary injunction is a restrictive or prohibitory process, designed to compel the party against whom it is granted to maintain his *status* merely until the matters in dispute shall by due process of the courts be determined; the sole foundation for such an order being, in addition to cases of the invasion of unquestioned rights, the prevention of irreparable mischief or injury. As a preliminary injunction is, in its operation, somewhat like judg-

ment and execution before trial, it is only to be resorted to from a pressing necessity, to avoid injurious consequences which can not be repaired under any standard of compensation. It is therefore a preventive remedy only."

<sup>40</sup> *Stevens v. Paterson & N. R. Co.*, 5 C. E. Green, 126; *Ligbee v. Camden & A. R. & T. Co.*, *ib.*, 435; *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. (2 Stew.), 299; *Long Branch Commissioners v. West End R. Co.*, *ib.*, 567. See also *Hackensack Improvement Commission v. New Jersey Midland R. Co.*, 7 C. E. Green, 94; *Newark Aqueduct Board v. City of Passaic*, 45 N. J. Eq., 393, 18 Atl., 106, affirmed in 46 N. J. Eq., 552, 22 Atl., 55; *Pennsylvania R. Co. v. N. D. & N. J. C. R. Co.*, 53 N. J. Eq., 178, 32 Atl., 220.

<sup>41</sup> *Harman v. Jones*, 1 Cr. & Ph., 299; *Lowndes v. Bettie*, 33 L. J. Ch., 451.

<sup>42</sup> *Harman v. Jones*, 1 Cr. & Ph., 299.

circumstances with a provision for a speedy investigation at law of the questions involved in dispute.<sup>43</sup>

§ 9. **Substantial injury must be shown; exception; relief not granted to encourage litigation, nor where it would operate inequitably.** Substantial and positive injury must always be made to appear to the satisfaction of a court of equity before it will grant an injunction, and acts which, though irregular and unauthorized, can have no injurious result, constitute no ground for the relief.<sup>44</sup> But where the act complained of is such that by its repetition or continuance it may become the foundation of adverse rights, equity may interfere by injunction, although no actual or substantial injury be shown.<sup>45</sup> But the relief in such case should be granted only to the extent that is necessary for the protection and vindication of the plaintiff's rights.<sup>46</sup> And it is a fatal objection to granting an injunction for the protection of property pending litigation that the party seeking the relief has no title to or interest in the property, and no claim to the ultimate relief sought by the litigation.<sup>47</sup> Nor will relief by injunction be granted where it would operate inequitably or contrary to

<sup>43</sup> *Harman v. Jones*, 1 Cr. & Ph., Port Arthur C. & D. Co., 31 C. C. A., 99, 87 Fed., 512; *Ulbricht v.*

<sup>44</sup> *Rogers v. Michigan S. & N. I. R. Co.*, 28 Barb., 539; *Head v. James*, 13 Wis., 641; *Bank of California v. Fresno C. & I. Co.*, 53 Cal., 201; *Atlantic City W. W. Co. v. Consumers W. Co.*, 44 N. J. Eq., 427; *Reemelin v. Mosby*, 47 Ohio St., 570, 26 N. E., 717; *Adler v. Met. El. R. Co.*, 138 N. Y., 173, 33 N. E., 935; *Dana v. Craddock*, 66 N. H., 593, 32 Atl., 757; *Christian v. City of St. Louis*, 127 Mo., 109, 29 S. W. 996; *Bobins v. Latham*, 134 Mo., 466, 36 S. W., 33; *Barnard v. Commissioners*, 172 Ill., 391, 50 N. E. 120; *McFadden v. Owens*, 54 Ark., 118, 15 S. W., 84; *Davis v.*

*Eufaula Water Co.* 86 Ala., 587, 6 So., 78, 4 L. R. A., 572, 11 Am. St. Rep., 72. And see *Gilfillan v. Grier*, 145 Pa. St., 317, 22 Atl., 593.  
<sup>45</sup> *Amsterdam Knitting Co. v. Dean*, 162 N. Y., 278, 56 N. E., 757; *Walker v. Emerson*, 89 Cal., 456, 26 Pac., 968.

<sup>46</sup> *Ulbricht v. Eufaula Water Co.*, 86 Ala., 587, 6 So., 78, 4 L. R. A., 572, 11 Am. St. Rep., 72; *dictum* in *Franklin v. Pollard Mill Co.*, 88 Ala., 318, 6 So., 685.

<sup>47</sup> *State v. McGlynn*, 20 Cal., 233. See also *O'Brien v. O'Connell*, 7 Hun, 228.

the real justice of the case.<sup>48</sup> And in no event will an injunction be granted whose effect would be to encourage litigation and a multiplicity of suits, thereby retarding instead of promoting justice.<sup>49</sup> Nor can a suitor invoke the aid of a court of equity to assist him in carrying on an unlawful business.<sup>50</sup>

§ 10. **Utmost care necessary; effect of acquiescence.** Interlocutory injunctions being often sought for the purpose of harassing and annoying defendants, the utmost care should be observed in the exercise of the jurisdiction, and the relief should only be allowed upon a clear necessity being shown of affording immediate protection to some right or interest of the party complaining which would otherwise be seriously injured or impaired.<sup>51</sup> And where the plaintiff will suffer no immediate injury from the acts complained of and the injury, if any, is of such a nature that it can be as easily remedied upon final hearing, a preliminary injunction is properly denied.<sup>52</sup> And where a state of affairs connected with the property touching which an injunction is sought has remained undisturbed for a long period of years, and is such a condition of things as will require an injunction as the ultimate relief in case complainant succeeds in his cause, a preliminary injunction will be withheld, no alteration or change being shown as threatened or impending.<sup>53</sup> And it may be asserted as a general rule that long acquiescence on the part of plaintiff in a state of things which he afterwards seeks to enjoin will prevent him from obtaining relief by interlocutory injunction,<sup>54</sup> even though it

<sup>48</sup> *Troy & Boston R. R. Co. v. B., H. T. & W. R. Co.*, 86 N. Y., 107; *Mott v. Underwood*, 148 N. Y., 463, 42 N. E., 1048, 51 Am. St. Rep., 711; *Rogers v. O'Brien*, 153 N. Y., 357, 47 N. E., 456; *Bowie v. Smith*, 97 Md., 326, 35 Atl., 625.

<sup>49</sup> *Endicott v. Mathis*, 1 Stockt., 110.

<sup>50</sup> *Portsmouth Brew. Co. v. P. B. & B. Co.*, 67 N. H., 433, 30 Atl., 346.

<sup>51</sup> *Osborn v. Taylor*, 5 Paige, 515. See *Beebe v. Guinault*, 29 La. An., 795.

<sup>52</sup> *Rend v. Venture Oil Co.*, 48 Fed., 248.

<sup>53</sup> *Society v. Holsman*, 1 Halst. Ch., 126.

<sup>54</sup> *Great Western R. Co. v. Oxford R. Co.*, 3 De G., M. & G., 341; *Ocean City Assn. v. Schurch*, 57 N. J. Eq., 268, 41 Atl., 914; *Keyes v.*



may not be sufficient to deprive him of injunctive relief upon the final hearing.<sup>55</sup> And where plaintiff has been guilty of long delay in asserting his rights, while a final hearing may be had in comparatively a short time, a preliminary injunction should be denied.<sup>56</sup> And it is held that the acquiescence which will bar relief must be such as proves plaintiff's assent to the acts complained of, and to the injuries which may reasonably be anticipated to flow from such acts.<sup>57</sup>

§ 10 *a.* **Mere acquiescence or delay as defense.** It is to be observed that the doctrine of laches or acquiescence as a defense to actions for injunctions, when unaccompanied by circumstances which would create an estoppel, is limited to cases of an equitable nature exclusively or to those in which the legal right in aid of which the injunction is sought has been lost by prescription or limitation; and where the legal right still exists, no period of inaction or delay merely, when unaccompanied by any of the elements of an estoppel, will constitute a bar to equitable relief unless continued so long and under such circumstances as to bar the right itself.<sup>58</sup>

§ 11. **Right to preliminary injunction discretionary; plaintiff may be questioned as to motives; no concealment tolerated.** The right to a preliminary injunction is not *ex debito justitiæ*, but the application is addressed to the sound discretion of the court, to be guided according to the circumstances of the particular case.<sup>59</sup> Hence it is the right and duty of the

Pueblo S. & R. Co., 31 Fed., 560; Waite v. Chichester Chair Co., 45 Fed., 258; Price v. Joliet Steel Co., 46 Fed., 107; Blakey v. Kurtz, 78 Fed., 368. But see Lux v. Haggin, 69 Cal., 255.

<sup>55</sup> Butler v. Egge, 170 Pa. St., 239, 32 Atl., 402; Levi v. Schoenthal, 57 N. J. Eq., 244, 41 Atl., 105.

<sup>56</sup> Pope Mfg. Co. v. Johnson, 40 Fed., 584.

<sup>57</sup> Lux v. Haggin, 69 Cal., 255.

<sup>58</sup> Menendez v. Holt, 128 U. S., 514, 9 Sup. Ct. Rep., 143; Galway v. M. E. R. Co., 128 N. Y., 132, 28 N. E., 479; Ackerman v. True, 175 N. Y., 353, 67 N. E., 629; Coombs v. S. L. & F. D. Co., 9 Utah, 322, 34 Pac., 248; Rigney v. Tacoma L. & W. Co., 9 Wash., 576, 37 Pac., 297.

<sup>59</sup> Stoddart v. Vanlaningham, 14 Kan., 18; Akin v. Davis, 14 Kan., 143; Olmstead v. Koester, 14 Kan., 463; Welde v. Scotten, 59 Md., 72;



court or officer granting the writ to require a full disclosure of the facts, and where it is apparent that such disclosure has not been made the relief may properly be refused.<sup>60</sup> And where it appears to the court that the cause of action is trivial and that the suit is not being prosecuted by the plaintiff in good faith and in his own interest, the court may require him to be questioned as to his motives, and may, in the exercise of its discretion, deny a preliminary injunction upon his refusal to answer.<sup>61</sup> There must be no misrepresentation or concealment of important facts, and if plaintiff keeps in the background material facts which are important to enable the court to form its judgment, such conduct is of itself sufficient to prevent the interposition of the court.<sup>62</sup> And if upon the application for a preliminary injunction it is doubtful what may be ascertained to be the real facts of the case upon final hearing, and if the rights of plaintiff will suffer no serious injury if not enforced until such hearing, the court may, in the exercise of a sound discretion, refuse the injunction *in limine*.<sup>63</sup> If, however, the danger threatened is of such a nature that it can not easily be remedied in case of a refusal of relief, and the answer does not deny that the act charged is contemplated, an interlocutory injunction should be allowed

North Carolina R. Co. *v.* Drew, 3 Woods, 674; Morris *v.* Bean, 123 Fed., 618. And in the application of the doctrine that the granting of an injunction is a matter of sound judicial discretion, a distinction has been drawn between cases where it is sought in aid of private right, and where it is asked in some matter *publici juris*; and in the latter class of cases it is held that the remedy being in the nature of a prerogative remedy, sought by the Attorney-General in behalf of the people, it is not a matter of judicial discretion, but

an absolute duty on the part of the court to grant the writ. Attorney-General *v.* Railroad Companies, 35 Wis., 425.

<sup>60</sup> Reddall *v.* Bryan, 14 Md., 444; County Commissioners *v.* Franklin Coal Co., 45 Md., 470; Morris *v.* Bean, 123 Fed. 618.

<sup>61</sup> People *v.* Butler, 24 Col., 401, 51 Pac., 510.

<sup>62</sup> Sprigg *v.* Western Telegraph Co., 46 Md., 67; Tifel *v.* Jenkins. 95 Md., 665, 53 Atl., 429.

<sup>63</sup> Conley *v.* Fleming, 14 Kan., 381.

unless the equities of the bill are satisfactorily refuted by defendant.<sup>64</sup> But the circumstance that the object of the action may be defeated by refusing a temporary injunction is not of itself sufficient to deprive the court of all discretionary power in the matter.<sup>65</sup>

§ 12. **Prevention of multiplicity of suits.** The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction; and it may be laid down as a general rule that whenever the rights of a party aggrieved can not be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction.<sup>66</sup> And where there is one common right in con-

<sup>64</sup> *United States v. Duluth*, 1 Dillon, 469. This was a bill for an injunction to protect certain improvements undertaken by the United States in its navigable waters from injury resulting from works carried on by state authority. Numerous affidavits of engineers and others were offered on both sides as to the effect of the work sought to be enjoined, the opinions expressed being quite conflicting. The court, Miller, J., say: "The affidavits on both sides are numerous. They demonstrate what all courts and juries have so often felt, that where the question is one of opinion and not of fact, though that opinion should be founded on scientific principles or professional skill, the inquiry is painfully unsatisfactory, and the answers strangely contradictory. In this emergency I am relieved by a principle which has generally governed me, and which, I believe, governs

nearly all judges in applications for preliminary injunctions. It is that, when the danger or injury threatened is of a character which can not be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. In this case I am not satisfied that it is so refuted."

<sup>65</sup> *Young v. Campbell*, 75 N. Y., 525.

<sup>66</sup> *Pennsylvania C. Co. v. Delaware & H. C. Co.*, 31 N. Y., 91; *Mills v. New Orleans Seed Co.*, 65 Miss., 391, 4 So., 298; *National Park Bank v. Goddard*, 131 N. Y., 494, 30 N. E., 566; *Hagan v. Blindell*, 6 C. C. A., 86, 56 Fed., 696; *Sanford v. Poe*, 16 C. C. A., 305, 69 Fed., 546, 60 L. R. A., 641; *McConaughy v. Pennoyer*, 43 Fed., 339. For an elaborate and exhaus-

troversy which is to be established by or against several persons, one person asserting the right against many or many against one, equity may interfere, and instead of permitting the parties to be harassed by a multiplicity of suits, determine the whole matter in one action.<sup>67</sup> But the rule has no application where there is no danger of a multiplicity of suits between the parties to the bill but only a possibility that other persons, not parties, might bring other suits for the enforcement of rights asserted by them upon substantially the same basis of facts.<sup>68</sup> And the plaintiff may be required first to establish his right at law as a condition precedent to relief in equity.<sup>69</sup>

### § 13. Relative convenience and inconvenience balanced.

Where the legal right is not sufficiently clear to enable a court of equity to form an opinion, it will generally be governed in deciding an application for a preliminary injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ. And where, upon balancing such considerations, it is apparent that the act complained of is likely to result in irreparable injury to complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted. But where, upon the other hand, it appears that greater danger is likely to result from granting than from

tive review of the authorities upon the subject of the prevention of a multiplicity of suits, see *Turner v. City of Mobile*, 135 Ala., 73, 33 So., 132.

<sup>67</sup> *Tenham v. Herbert*, 2 Atk., 483; *Sheffield Water-works v. Yeomans*, 2 L. R. Ch. App., 8; *Ellsworth v. Hale*, 33 Ark., 633; *Illinois Central R. Co., v. Garrison*, 81 Miss., 257, 32 So., 996, 95 Am. St. Rep., 469; *Hightower v. Mobile, J. & K. C. R. Co.*, (Miss.) 36 So., 82;

*City of Chicago v. Collins*, 175 Ill., 445, 51 N. E., 907, 49 L. R. A., 408, 67 Am. St. Rep., 224; *Smith v. Smith*, 148 Mass., 1, 18 N. E., 595; *Sang Lung v. Jackson*, 85 Fed., 502; *Morris v. Hitchcock*, 21 App. D. C., 565. And see *Crews v. Burcham*, 1 Black, 352; *Woodruff v. Fisher*, 17 Barb., 224.

<sup>68</sup> *Dyer v. School District*, 61 Vt., 96, 17 Atl., 788.

<sup>69</sup> *Pennsylvania C. Co., v. Delaware & H. C. Co.*, 31 N. Y., 91.

withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will be refused and the parties left as they are until the legal right can be determined at law or upon final hearing.<sup>70</sup> And if plaintiff's rights may be as well secured by a final injunction, and are not prejudiced by the refusal of a temporary injunction, the court may refuse the interlocutory application, especially when the injuries which would result to defendant if the relief were improperly granted would greatly exceed the benefits which might result to plaintiff if the injunction were properly granted.<sup>71</sup> Indeed, the consideration of relative convenience and inconvenience to the parties is one of the principal guides which govern courts of equity in the matter of granting or withholding relief by interlocutory injunction.

<sup>70</sup> *Cory v. Yarmouth & N. R. Co.*, 124 Fed., 156; *Foster v. Ballenberg*, 43 Fed., 821; *Southwestern Co. v. Shrewsbury & B. R. Co.*, 1 B. E. L. & P. Co. v. Louisiana E. L. Co., 45 Fed., 893; *Whitcomb v. Girard Coal Co.*, 47 Fed., 315; *Indianapolis Gas Co. v. City of Indianapolis*, 82 Fed., 245; *Railroad & Telephone Co. v. Board of Equalizers*, 85 Fed., 302; *Amelia Milling Co. v. Tenn. C. I. & R. Co.*, 123 Fed., 811. And see *Hilton v. Granville*, 1 Cr. & Ph., 283; *Morris & E. R. Co. v. Prudden*, 5 C. E. Green, 530; *Hackensack Improvement Commission v. New Jersey Midland R. Co.*, 7 C. E. Green, 94; *McCorkle v. Brem*, 76 N. C., 407; *Dyke v. Taylor*, 3 DeG., F. & J., 467; *Fielden v. Lancashire & Y. R. Co.*, 2 De G. & Sm., 531; *Elwes v. Payne*, 12 Ch. D., 468; *Pioneer Wood Pulp Co. v. Bensley*, 70 Wis. 476; *Higgins v. Westervelt*, 44 N. J. Eq., 254.

<sup>71</sup> *Olmstead v. Koester*, 14 Kan., 463.

<sup>70</sup> *Cory v. Yarmouth & N. R. Co.*, 3 Hare, 593; *Shrewsbury & C. R. Co. v. Shrewsbury & B. R. Co.*, 1 Sim. (N. S.), 410; *Attorney-General v. Mayor, etc.*, 1 Myl. & Cr., 171; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Cr., 784; *Harrison v. Yerby*, 87 Ala., 185, 6 So., 3; *Highland A. & B. R. Co. v. Birmingham U. Ry. Co.*, 93 Ala., 505, 9 So., 568; *Newark P. R. Co. v. Township of East Orange*, 53 N. J. Eq., 248, 31 Atl., 722; *Daugherty v. Kittanning I. & S. Co.*, 178 Pa. St., 215, 35 Atl., 1111; *Kohn v. Old T. M. Co.*, 2 Utah, 13; *McGregor v. Silver King Mining Co.*, 14 Utah, 47, 45 Pac., 1091, 60 Am. St. Rep., 883; *Crescent Mining Co. v. Silver King Mining Co.*, 14 Utah, 57, 45 Pac., 1093; *Bartlett v. Bartlett & Son*, 116 Wis., 450, 93 N. W., 473; *City of Newton v. Levis*, 25 C. C. A., 161, 79 Fed., 715; *Allison v. Carson*, 32 C. C. A., 12, 88 Fed., 581; *Denver & R. G. R. Co. v. United States*, 59 C. C. A., 579,

And upon the same principle, a temporary injunction may properly be modified where by so doing the burden imposed by the injunction upon the defendant will be lightened without any corresponding injury to the plaintiff's rights.<sup>72</sup> If, however, a clear case of irreparable injury is shown as likely to result to complainant unless the injunction is granted, and it does not appear that the issuing of the writ will work any such injury to defendants, the relief will be granted.<sup>73</sup>

§ 14. **Possession rarely interfered with by injunction.** The object of an interlocutory injunction being the preservation of the property or rights in controversy until a full and final hearing upon the merits, where there are conflicting rights to the possession of property, either personal or real, a court of equity will not upon the unsupported showing of the bill grant an injunction whose effect would be to award possession, and thus determine the merits of the case upon an *ex parte* application.<sup>74</sup> Nor will parties in possession, whose rights were acquired by purchase at a sheriff's sale from one in peaceable possession, be enjoined from the use and enjoyment of the property by other purchasers claiming adversely to the first vendor, each purchaser being ignorant at the time of purchase of any title save that of his vendor.<sup>75</sup> Nor should a court by preliminary mandatory injunction transfer the possession of real estate from the defendant to the plaintiff.<sup>76</sup> Where, however, defendant's possession is but an interruption of the prior and lawful possession of complainant, whose right is clear and certain, equity may interfere without compelling complainant to establish his title by an action at law.<sup>77</sup> And an injunction

<sup>72</sup> *Denver & R. G. R. Co. v. United States*, 59 C. C. A., 579, 124 Fed., 156.

<sup>73</sup> *Brown v. Pacific Cable Co.*, 5 Blatch., 525.

<sup>74</sup> *Martin v. Broadus*, Freem. Ch., 35; *Deklyn v. Davis*, Hopk. Ch., 135; *Bettman v. Harness*, 42 West Va., 433, 26 S. E., 271, 36 L. R. A.,

566. And see *Conway, Ex parte*, 4 Ark., 302; *McGee v. Smith*, 1 C. E. Green, 462.

<sup>75</sup> *Kelly v. Morris*, 31 Ga., 54.

<sup>76</sup> *Catholicon Hot Springs Co. v. Ferguson*, 7 S. Dak., 503, 64 N. W., 539.

<sup>77</sup> *Conway, Ex parte*, 4 Ark., 302.



restraining plaintiff in an action at law from molesting defendants in the possession and enjoyment of their property will not prevent the plaintiff from proceeding with his action to try the right.<sup>78</sup> But to warrant an injunction against the disposal of personal property, plaintiff must show a specific right to the property, and that there is danger of its loss unless the court shall interfere.<sup>79</sup> And as between tenants in common of personalty, equity is averse to interfering by injunction with the possession of one of the co-tenants, since they are equally entitled to possession.<sup>80</sup> But it is proper upon a bill seeking a division of personal property and an account of rents and profits to enjoin a co-tenant, in possession, from waste or destruction of the property, and from removing it beyond the jurisdiction of the court.<sup>81</sup>

§ 15. **Discretion not controlled by mandamus; courts of co-ordinate jurisdiction.** It has already been observed that the granting or withholding of an interlocutory injunction is a matter resting in the sound discretion of the court, to be exercised according to the circumstances of each particular case.<sup>82</sup> *Mandamus* will not, therefore, lie to control an inferior court or judge in the exercise of such discretion, and to compel him

<sup>78</sup> *Mayor v. Magnon*, 4 Mart. (La.), O. S., 2.

<sup>79</sup> *Ximenes v. Franco*, 1 Dick., 149.

<sup>80</sup> *Blood v. Blood*, 110 Mass., 545.

<sup>81</sup> *Low v. Holmes*, 2 C. E. Green, 148.

<sup>82</sup> *Reddall v. Bryan*, 14 Md., 444. This discretion, however, is by no means an arbitrary one, and is to be exercised in accordance with established principles of law and equity. It has been well said that "the discretion which is to be exercised here is to be governed by the rules of law and equity, which are not to oppose, but each in its

turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others again it relieves against the abuse or allays the rigor of it; but in no case does it contradict or overturn the grounds and principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with." Lord Romilly, Master of the Rolls, in *Haywood v. Cope*, 25 Beav., 151,



either to grant or to dissolve an injunction.<sup>83</sup> But where one court has in the exercise of its discretion refused an application for an interlocutory injunction, it is merely a question of courtesy whether another of co-ordinate jurisdiction and equal powers shall grant the relief. In such case the jurisdiction of the second court can in nowise be affected by the refusal of the first; nor can the first afterward vacate the injunction ordered by the second, except upon a regular hearing of a motion to dissolve.<sup>84</sup> But where one of two courts of co-ordinate jurisdiction and powers has obtained jurisdiction of a cause it should retain it until finally disposed of; and although both courts may have authority to grant injunctions, yet if one tribunal properly having cognizance of the case has exercised its jurisdiction the other should refuse to interfere.<sup>85</sup>

quoting from the Master of the Rolls, in *Burgess v. Wheate*, 1 Eden, 214.

<sup>83</sup> Hays, *Ex parte*, 26 Ark., 510; *McMillen v. Smith*, *Ib.*, 613; *Ex parte* City Council of Montgomery, 24 Ala., 98; *State v. Judge of Sixth District Court*, 28 La. An., 905; *Ex parte* Schwab, 98 U. S., 240; *People v. Butler*, 24 Col., 401, 51 Pac., 510; *Detroit & B. P. R. Co. v. Frazer*, 98 Mich., 141, 56 N. W. 1109; *Krolik v. Wayne Circuit Judge*, 112 Mich., 486, 70 N. W., 1132; *Briggs v. Wayne Circuit Judge*, 118 Mich., 200, 76 N. W., 1134; *Kelsey v. Wayne Circuit Judge*, 120 Mich., 457, 79 N. W., 694; *Chiera v. Brevoort*, 97 Mich., 638, 57 N. W., 193. And see *State v. Parish Judge of St. Bernard*, 31 La. An., 794; *State v. Judge of Sixth District Court*, 32 La. An., 549. See, *contra*, *Ex parte Conway*, 4 Ark., 302; *Ex parte Pile*, 9 Ark., 336. In Michigan it is held that where all the questions in-

volved are purely ones of law and there is a pressing necessity for a decision, or where it was clearly beyond the power of the judge to grant the injunction in the particular case, *mandamus* will lie to control the action of the lower court. *People v. Judge of St. Clair Circuit*, 31 Mich., 456; *Thomas v. Kent Circuit Judge*, 116 Mich., 106, 74 N. W., 381; *Bogert v. Jackson Circuit Judge*, 118 Mich., 457, 76 N. W., 983; *Dodge v. Van Buren Circuit Judge*, 118 Mich., 189, 76 N. W. 315; *City of Detroit v. Hosmer*, 79 Mich., 384, 44 N. W., 622; *Ionia, etc. Insurance Co. v. Davis*, 100 Mich., 606, 59 N. W., 250, 32 L. R. A., 481; *Board of Supervisors v. Wayne Circuit Judge*, 106 Mich., 166, 64 N. W., 42; *City of Alpena v. Kelley*, 97 Mich., 550, 56 N. W., 941.

<sup>84</sup> *Welch v. Byrns*, 38 Ill., 20. And a clerk refusing to issue the writ may be punished for contempt. *Id.*

<sup>85</sup> *Winn v. Albert*, 2 Md. Ch., 42.

Nor will the prosecution of a suit in one court be enjoined by a court of co-ordinate jurisdiction, when the former tribunal may afford adequate relief.<sup>86</sup>

§ 16. **Not granted against covenant, or offer to perform.** Equity will not grant an injunction for the protection of a naked, legal right which complainant and those under whom he claims have covenanted not to exercise.<sup>87</sup> Nor will the relief be granted against a defendant who in the presence of the court offers to carry out and perform all that complainant upon his own showing is entitled to.<sup>88</sup> And where it is apparent that neither of the parties to the litigation is entitled to the exercise of the right or privilege in controversy, which properly pertains to the public, a court of equity, acting in behalf of the public, will enjoin both parties, although the state is not a nominal party to the cause.<sup>89</sup>

§ 17. **When injunction operative; official notice not necessary.** An injunction becomes effective as to the party enjoined only from the time of actual notice.<sup>90</sup> And to render an injunction binding and operative upon a defendant it is not necessary that he should have been officially apprised of its existence, or actually served with the writ. And where a defendant has heard the order of the court granting an injunction, or has in any manner received actual notice of its existence, or is informally served, he is as effectually bound by its provisions as if actually and duly served with process.<sup>91</sup> So if an injunction has been properly granted it will be effective if served

<sup>86</sup> *Wilson v. Baker*, 64 Cal., 475, 2 Pac., 253.

<sup>87</sup> *Bosley v. McKim*, 7 Har. & J. 468.

<sup>88</sup> *Behn v. Young*, 21 Ga., 207.

<sup>89</sup> *Wharf Case*, 3 Bland, 361.

<sup>90</sup> *Ramsdall v. Craighill*, 9 Ohio, 197.

<sup>91</sup> *Milne v. Van Buskirk*, 9 Iowa, 558; *Hull v. Thomas*, 3 Edw. Ch.,

236; *Howe v. Willard*, 40 Vt., 654; *Farnsworth v. Fowler*, 1 Swan, 1; *Skip v. Harwood*, 3 Atk., 564; *Anon.*, Ib., 567; *Hearn v. Tennant*, 14 Ves., 136; *McNeil v. Garratt*, 1 Cr. & Ph., 98; *Golden Gate C. H. M. Co. v. Superior Court*, 65 Cal., 187, 3 Pac., 628; *Fowler v. Beckman*, 66 N. H., 424, 30 Atl., 1117.

upon defendants beyond the jurisdiction of the court, or the limits of the state, it only being necessary that they should be apprised of the order of the court to render it binding.<sup>92</sup>

§ 18. **Threatened injury sufficient; difficulty in obeying injunction no defense; insolvency not alone sufficient.** The remedy by interlocutory injunction being preventive in its nature, it is not necessary that a wrong should have been actually committed before a court of equity will interfere, since if this were required it would in most cases defeat the very purpose for which the relief is sought by allowing the commission of the act which complainant seeks to restrain. And satisfactory proof that defendants threaten the commission of a wrong which is within their power is sufficient ground to justify the relief.<sup>93</sup> So it is no defense by way of demurrer to the bill that the act complained of has not been done where the defendant is threatening to do the act and will do so unless restrained by the court.<sup>94</sup> But where the act sought to be enjoined is an official one imposed upon a public officer by the command of higher authority which he has no power to question or dispute, proof that he has threatened to do the act sought to be restrained will not be required.<sup>95</sup> And where the plaintiff's rights and their violation by the defendant are clear, it is no defense to an application for an injunction that the latter may find it a matter of difficulty to keep within the terms of the court's order.<sup>96</sup> Upon the question whether the

<sup>92</sup> *Haring v. Kauffman*, 2 Beas., 397.

<sup>93</sup> *McArthur v. Kelley*, 5 Ohio, 139; *Kimberly & C. Co. v. Hewitt*, 75 Wis., 371, 44 N. W., 303. In *Real Estate T. Co. v. Hatton*, 194 Pa. St., 449, 45 Atl., 379, it was held that where the defendant, by answer and in open court, disclaims any intention of doing the acts sought to be enjoined, although a preliminary injunction

should be denied, yet the bill should be retained with leave to the plaintiff to apply for an injunction and it was therefore held error to dismiss the bill.

<sup>94</sup> *Union M. & M. Co. v. Warren*, 82 Fed., 522.

<sup>95</sup> *Williams v. Boynton*, 147 N. Y., 426, 42 N. E., 184.

<sup>96</sup> *Northern Pacific Ry. Co. v. Cunningham*, 103 Fed., 708.

mere insolvency of the defendant, unaccompanied by any other circumstances, is sufficient to justify relief by injunction, the authorities are conflicting. Although there are frequent intimations by the courts that mere insolvency is sufficient ground for equitable interference, yet the weight of the actual adjudications upon the question is clearly to the effect that the mere inability of the defendant to respond in damages at law, although it may properly be taken into consideration upon an application for the extraordinary aid of equity by injunction, does not of itself constitute a sufficient foundation for the relief.<sup>97</sup>

§ 19. **Disclosure of secrets enjoined.** The disclosure of secrets which have come to one's knowledge during the course of a confidential employment will be restrained by injunction. And where a confidential relationship has existed, out of which one of the parties has derived information or secrets concerning the other, equity fastens an obligation upon his conscience not to divulge such knowledge, and enforces the obligation when necessary by injunction. Thus, persons who in the capacity of attorneys, agents or in other confidential relations, have obtained the custody of the books and documents of their principals, or have come into possession of secrets relating to their affairs, will be restrained from making them public.<sup>98</sup> So defendants will be enjoined from disclosing the

<sup>97</sup> *Mechanics Foundry v. Ryall*, 75 Cal., 601, 17 Pac., 703; *Centre-ville & Abington T. Co. v. Barnett*, 2 Ind., 536; *Heilman v. Union C. Co.*, 37 Pa. St., 100; *Parker v. Furlong*, 37 Ore., 248, 62 Pac., 490; *Moore v. Halliday*, (Ore.) 72 Pac., 801; *Welk v. Dayton*, 11 Nev., 161. And see *Miller v. Wills*, 95 Va., 337, 28 S. E., 337; *Raleigh & Western Ry. Co. v. G. & G. M. & M. Co.*, 112 N. C., 661, 17 S. E., 77. *Contra*, *Wilson v. Hill*, 46 N. J. Eq., 367, 19 Atl., 1097. And see, also, *contra*, *Taylor v. Russell*, 119 N. C., 30, 25 S. E., 710; *Morganton L. & I. Co. v. Webb*, 117 N. C., 478, 23 S. E., 458; *Harms v. Jacobs*, 158 Ill., 505, 41 N. E., 1071. See, *post*, § 400 as to the effect of the insolvency of the vendor of realty upon the vendee's right to restrain the collection of unpaid purchase money upon a failure of title.

<sup>98</sup> *Evitt v. Price*, 1 Sim., 483; *Morison v. Moat*, 9 Hare, 255; *Prince Albert v. Strange*, 1 Mac. & G., 25; *Lewis v. Smith*, *ib.*, 417; *Williams v. Prince of Wales*, 23 Beav., 340; *Davies v. Clough*, 8 Sim., 262; *Goodale v. Goodale*, 16 Sim., 316; *Salomon v. Hertz*, 40 N.

secrets pertaining to plaintiff's business and processes of manufacturing goods, defendants having acquired such knowledge while in plaintiff's employ, under an agreement that, in consideration of the employment, they would not divulge such secrets.<sup>99</sup> And in such case it is unnecessary that there should be an express covenant upon the part of the defendant not to disclose the secrets of plaintiff's business if such an agreement may fairly be implied from the circumstances of the case and the relation of the parties.<sup>1</sup> And the injunction may properly run not only against the employee who is thus violating the plaintiff's rights but also against his competitors

J. Eq., 400, 2 Atl., 379; *Yovatt v.* Winyard, 1 Jac. & W., 394; *Merryweather v. Moore*, (1892) 2 Ch., 518; *Jarvis v. Peck*, 10 Paige Ch., 118; *Peabody v. Norfolk*, 98 Mass., 452.

<sup>99</sup> *Salomon v. Hertz*, 40 N. J. Eq., 400, 2 Atl., 379; *Thum Co. v. Tloczynski*, 114 Mich., 149, 72 N. W., 140, 38 L. R. A., 200, 68 Am. St. Rep., 469; *Fralich v. Despar*, 165 Pa. St., 24, 30 Atl., 521; *Stone v. Goss*, 65 N. J. Eq., 756, — Atl., —, 63 L. R. A., 344.

<sup>1</sup> *Westervelt v. National Paper Co.*, 154 Ind., 673, 57 N. E., 552; *Harrison v. Glucose Sugar R. Co.*, 53 C. C. A., 484, 116 Fed., 304, 58 L. R. A., 915; *Stone v. Goss*, 65 N. J. Eq., 756, — Atl., —, 63 L. R. A., 344; *Eastman Kodak Co. v. Reichenbach*, 79 Hun, 183, 29 N. Y. Supp., 1143; *Little v. Gallus*, 4 App. Div., 569; *dictum* in *Thum Co. v. Tloczynski*, 114 Mich., 149, 72 N. W., 140, 38 L. R. A., 200, 68 Am. St. Rep., 469. And see *Silver Spring B. & D. Co. v. Woolworth*, 16 R. I. 729, 19 Atl., 528. In *Westervelt v. National Paper Co.*, 154 Ind., 673,

57 N. E., 552, *supra*, *Monks, J.*, makes use of the following language: "It is evident from the authorities cited that if a person employs another to work for him in a business in which he makes use of a secret process, or of machinery invented by himself, or by others for him, but the nature and particulars of which he desires to keep a secret, and of which desire on the part of the employer the employe has notice at the time of his employment, even if there is no express contract on the part of the employe not to divulge said secret process or machinery, the law will imply a promise to keep the employer's secret thus entrusted to him; and any attempt on his part to use the secret process or machinery, or to construct the machinery for his own use as against the master, or to communicate said secret to others, or in any manner to aid others in using the same, or in constructing the machinery, will not only be a breach of his contract with his employer, but a breach



who have wrongfully induced the employee to disclose to them the secrets of the business, restraining them from making use of such information.<sup>2</sup> And where defendant has thus put himself in the wrong by procuring from plaintiff's employee a disclosure of trade secrets, it is no defense to the application for the injunction that the defendant himself, by his own independent investigation, would in all probability have discovered the secret process in question.<sup>3</sup> Nor is the necessary disclosure of the secrets of plaintiff's business during the course of the trial such a publication as will prevent him from obtaining the desired relief.<sup>4</sup> And where plaintiff is engaged in the business of procuring early data and information in regard to the erection of public buildings and other public works which it furnishes to its customers under an agreement upon their part to keep it secret, an injunction will lie to restrain the customers from divulging the information thus obtained, contrary to the agreement.<sup>5</sup> The rule, however, does not extend to cases where a fraudulent transaction has come to the knowledge of the person occupying the confidential relation, since equity can extend no protection to iniquitous secrets.<sup>6</sup> Nor will the relief be granted where it appears that long before the filing of his bill, the plaintiff has sold out and ceased doing business, since no injury could result to him in such a case.<sup>7</sup>

of confidence and violation of duty which will be enjoined by a court of equity."

<sup>2</sup> *Westervelt v. National Paper Co.*, 154 Ind., 673, 57 N. E., 552; *Stone v. Goss*, 65 N. J. Eq., 756, — Atl., —, 63 L. R. A., 344.

<sup>3</sup> *Stone v. Goss*, 65 N. J. Eq., 756, — Atl., —, 63 L. R. A., 344.

<sup>4</sup> *Stone v. Goss*, 65 N. J. Eq., 756, — Atl., —, 63 L. R. A., 344. See this case to the effect that in such case it is proper to have the hearing in private and to have only

enough copies of the secret testimony to supply the members of the court. Nor is the plaintiff required to set forth his secret processes in the bill. *Adams v. Knapp*, 121 Fed., 34, 40.

<sup>5</sup> *Dodge Co. v. C. I. Co.*, 183 Mass., 62, 66 N. E., 204, 60 L. R. A., 810.

<sup>6</sup> *Gartside v. Outram*, 3 Jur. N. S., 40.

<sup>7</sup> *Shonk Tin Printing Co. v. Shonk*, 138 Ill., 34, 27 N. E., 529.



§ 20. **Criminal acts not enjoined.** The subject-matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts, unconnected with violations of private right. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations and the performance of moral duties; nor will it interfere for the prevention of an illegal act merely because it is illegal. And in the absence of any injury to property rights it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral and illegal acts.<sup>8</sup> Thus, the relief has been refused to prevent persons from carrying on the business of banking in violation of a statute restraining unincorporated banking associations.<sup>9</sup> So where it was sought to enjoin

<sup>8</sup>*Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch., 371; *Friedman*, 2 Idaho, 393, 17 Pac., 635.

*Sparhawk v. Union P. R. Co.*, 54 Pa. St., 401; *Babcock v. New Jersey S. Y. Co.*, 5 C. E. Green, 296; *Emperor of Austria v. Day*, 3 De G., F. & J., 217; *Cope v. District Fair Association*, 99 Ill., 489; *Portis v. Fall*, 34 Ark., 375; *Medical & Surgical Institute v. City of Hot Springs*, 34 Ark., 559; *State v. Schweickardt*, 109 Mo., 496, 19 S. W., 47; *Worthington v. Waring*, 157 Mass., 421, 32 N. E., 744, 20 L. R. A., 342; *State v. Capital City Dairy Co.*, 62 Ohio St., 123, 56 N. E., 651; *State v. O'Leary*, 155 Ind., 526, 58 N. E., 703, 52 L. R. A., 299; *People v. District Court*, 26 Col. 386, 58 Pac., 604, 46 L. R. A., 850; *O'Brien v. Harris*, 105 Ga., 732, 31 S. E., 745; *Ocean City Assn. v. Schurch*, 57 N. J. Eq., 268, 41 Atl., 914; *Tiede v. Schneidt*, 99 Wis., 201, 74 N. W., 798; *McGinnis v.*

<sup>9</sup>*Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch., 371. The information filed in this case by the Attorney-General, *ex officio*, sought to restrain the defendant, a company incorporated for transacting the business of fire and marine insurance, from engaging in banking operations without authority in its act of incorporation, and in direct violation of a public statute prohibiting unincorporated banking associations. Kent, chancellor, after suggesting that the question involved was purely a legal question, the charge partaking of the nature of a criminal offense, observes as follows: "If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of

defendants from running their street cars on Sunday, in violation of a statute making it a penal offense, the relief was refused, although the action was brought by pewholders and

this court, which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate. Nor ought the process of injunction to be applied but with the utmost caution. It is the strong arm of the court; and to render its operation benign and useful it must be exercised with great discretion, and when necessity requires it. Assuming the charges in the information to be true, it does not appear to me that the banking power, in this case, produces such imminent and great mischief to the community as to call for this summary remedy. The English Court of Chancery rarely uses this process, except when the right is first established at law, or the exigency of the case renders it indispensable. Thus, in *Brown's case*, in 2 Vesey, 414, a motion was made for an injunction to stay the use of a market, and Lord Hardwicke said it was a most extraordinary attempt, and that the plaintiff had several remedies which he might use. He said it would cause great confusion to bring into contempt, upon the injunction, all persons who might use the market; and that if the court ought to interpose at all, it would be after the title was established at law. So he observed in another case (*Amb., 209, Anon.*) that the court granted an injunction to stay the working of a colliery with great reluctance, and will not do it except where there is a breach of an express covenant or an uncontroverted mischief. In a late case before Lord Eldon (*Attorney-General v. Nichol*, 16 Vesey, 338), on an information filed to restrain the defendant from obstructing the ancient lights of a hospital, he stated that the foundation of this jurisdiction by injunction was that head of mischief, or those mischievous consequences, which required a power to prevent as well as to remedy, and that there might be nuisances which would support an action but which would not support an injunction. If the defendants are carrying on banking operations contrary to law they ought undoubtedly to be restrained; but I can not be of opinion that the operation is such a mischief or public nuisance as to require the immediate and extraordinary process of this court to abate it. I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly for a court of equity to interfere at all, and much less preliminarily, by injunction, to put down a *public* nuisance which did not violate the rights of property, but only contravened the general policy. . . . The plain state of the case, then, is that an information is here

property owners on the line of defendants' track. In all such cases ample remedy may be had by proceedings at law, and, the offense being *damnum absque injuria*, courts of equity will not interfere.<sup>10</sup> So equity will not enjoin the mainte-

filed by the Attorney-General to redress and restrain, by injunction, the usurpation of a franchise, which, if true, amounts to a breach of law and of public policy. I may venture to say that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in the courts of law. How, then, can I hesitate on the question of jurisdiction? The whole question, upon the merits, is one of law and not of equity. The charge is too much of the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this without the clearest sanction. I shall better consult the stability and utility of the powers of this court by not stretching them beyond the limits prescribed by the precedents."

<sup>10</sup> *Sparhawk v. Union P. R. Co.*, 54 Pa. St., 401. This was a bill filed by pewholders in churches and owners of dwelling houses along the line of defendants' street railway to restrain the running of cars on Sunday. The bill charged that by reason of defendants running their cars on Sunday complainants "have been, and are and will be, deprived of their right of enjoying the Sabbath as a day of rest and religious exercise, free of all disturbance from merely unnecessary and unauthorized world-

ly employment; that they have been, are and will be thereby deprived from enjoying peaceably and without interruption the worship of Almighty God in their accustomed places of public worship or in their own residences on the Sabbath day; and that the lawful peace of the said day is thereby disturbed and broken, and the rights of property which they possess in their said churches or places of public worship, and in their private residences, are and will continue to be thereby infringed upon, and their said churches and residences deteriorated in value." The injunction was denied, Thompson, J., saying: "It seems to me that this is clearly but a charge of the violation of the provisions of the act of assembly of 1794 which interdicts worldly employment on the Sabbath day, and that it describes nothing but the consequences which are intended to be prevented by that act. If this be so, then it is not a case of special injury, but only that which results from a public offense or wrong to all and every one in the community alike where the act is committed. It is not possible, I think, to discover the connection between the cause of complaint and a private injury, excepting in and through the act as prohibited by the statute. And if we are to regard it as a common law offense

nance of a gambling house,<sup>11</sup> or of a race track and pool room,<sup>12</sup> such acts being punishable under the criminal laws of the state. Nor will an injunction issue to restrain the sale of spirituous liquors in violation of the criminal laws.<sup>13</sup> Nor will a mandatory injunction be granted to compel obedience to the penal laws of the state.<sup>14</sup> And in accordance with the well settled doctrine that equity will not interfere with the administration of the criminal laws of the state, an injunction will not be granted against the enforcement of executions for

the charge in the bill does no more than describe the fruits of the offense. Rest and quiet on the Sabbath day, with the right and privilege of public and private worship undisturbed by any mere worldly employment, are exactly what the statute was passed to protect. 10 Casey, 398. The deprivation of these privileges is the sum of the complaint, and this bill is essentially, therefore, a bill to enforce by injunction a penal statute. That is not our province, especially at the suit of a private party." In Wisconsin, however, it is held that the Supreme Court of the state, in the exercise of its original jurisdiction under the constitution, may entertain an information by the Attorney-General to restrain corporations from an excess or abuse of their corporate franchises, or from a violation of a public law to the detriment or injury of the public. The court may, therefore, entertain an information against a railway to enjoin it from violating a law of the state regulating the rates to be charged by railways for the carriage of freight and passengers, and to enforce by injunction obedience to the statute, notwith-

standing the statute provides penalties against the agents of the corporation for its violation. And the right to relief by injunction is upheld in such case, although there may be an adequate remedy at law by proceedings in *quo warranto*. But the Attorney-General will be compelled to elect which remedy he will pursue, and if proceedings are already pending in *quo warranto* the court will require the dismissal of such proceedings as a condition to granting relief by injunction. Attorney-General v. The Railroad Companies, 35 Wis., 425. The case is believed to constitute the only precedent for the interference of equity to enforce by injunction obedience to a penal statute, and it certainly extends the jurisdiction by injunction to a point unsustained either by principle or upon authority.

<sup>11</sup> *People v. District Court*, 26 Col., 386, 58 Pac., 604, 46 L. R. A., 850.

<sup>12</sup> *State v. O'Leary*, 155 Ind., 526, 58 N. E., 703, 52 L. R. A., 299.

<sup>13</sup> *O'Brien v. Harris*, 105 Ga., 732, 31 S. E., 745.

<sup>14</sup> *State v. Capital City Dairy Co.*, 62 Ohio St., 123, 56 N. E., 651.



costs issued against an unsuccessful party to a criminal prosecution.<sup>15</sup> Nor will a court of equity enjoin a judgment imposed for violating a law of the state.<sup>16</sup> Nor will it enjoin suits or prosecutions of a criminal nature.<sup>17</sup>

§ 20 *a*. **When relief granted though acts are criminal.** It must constantly be borne in mind, however, that the rule forbidding interference by equity to restrain the commission of crimes is limited strictly to cases where the acts sought to be enjoined are unaccompanied by any injury to property rights and where the granting of the relief would, therefore, be, in effect, the enforcement by courts of equity of the penal laws of the state. And where the acts against which the relief is prayed are such as to cause irreparable damage to property or property rights, or the case is one which for any other reason calls for the interposition of equity according to established principles, the mere fact that such acts are also criminal in their nature and punishable under the penal laws of the state constitutes no valid defense to the interference of the court by injunction. In such case property rights are being violated and it is for their protection that it is the duty of the court to interfere and the wrong-doer will not be permitted to shield himself from the strong arm of equity by pleading the criminal nature of the wrongs in which he is engaged.<sup>18</sup>

<sup>15</sup> *Gault v. Wallis*, 53 Ga., 675.

<sup>16</sup> *Joseph v. Burk*, 46 Ind., 59.

<sup>17</sup> *Moses v. Mayor of Mobile*, 52 Ala., 198; *Washington & G. R. Co. v. District of Columbia*, 6 Mackey, 570; *Poyer v. Village of Des Plaines*, 123 Ill., 111, 13 N. E., 819.

<sup>18</sup> *In re Debs*, 158 U. S., 564, 15 Sup. Ct. Rep., 900; *Hamilton-Brown S. Co. v. Saxey*, 131 Mo., 212, 32 S. W., 1106, 52 Am. St. Rep., 622; *Coeur D'Alene C. M. Co. v. Miners' Union*, 51 Fed., 260, 19 L. R. A., 382; *Toledo, A. A. & N. M. Ry. Co.*

*v. Pennsylvania Co.*, 54 Fed., 730,

19 L. R. A., 387; *United States v.*

*Elliott*, 64 Fed., 27; *Consolidated*

*S. & W. Co. v. Murray*, 80 Fed., 811;

*Nashville, C. & St. L. Co. v. Mc-*

*Connell*, 82 Fed., 65; *Union Pacific*

*R. Co. v. Ruef*, 120 Fed., 102; *Jones*

*v. Oemler*, 110 Ga., 202, 221, 35 S.

E., 375; *Peoples Gas Co. v. Tyner*,

131 Ind., 277, 31 N. E. 59, 16 L.

R. A., 443, 31 Am. St. Rep., 433;

*Columbian Athletic Club v. State*,

143 Ind., 98, 40 N. E., 914, 52 Am.

St. Rep., 407; *Cumberland Glass*



§ 20 *b*. **No relief against injury to one's feelings; nor for protection of "right of privacy," or of political rights.** Courts of equity being concerned, as already pointed out, only with property and property rights, they will not interfere by injunction to restrain wrongs which result only in injury to one's feelings or to prevent the violation of rights which are of a purely personal nature and which have no connection or association with property interests. And whether or not there exists in our jurisprudence a so-called "right of privacy," the violation of which would be actionable in a court of law or might be made the basis for prosecutions of a criminal nature, as to which the authorities are somewhat in conflict, certain it is that no such right exists as a sufficient basis for the interposition of a court of equity by the extraordinary remedy of injunction.<sup>19</sup> An injunction will therefore not lie to restrain the publication of a biographical sketch of a deceased member of plaintiff's family.<sup>20</sup> So equity will not enjoin the distribution of lithographic prints and likenesses of plaintiff in connection with advertisements of defendant's business.<sup>21</sup> So the

*Mfg. Co. v. G. B. B. Assn.*, 59 N. J. Eq., 49, 46 Atl., 208; *Vegeahn v. Gunther*, 167 Mass., 92, 44 N. E., 1077, 57 Am. St. Rep., 443; *Beck v. Railway Teamsters Union*, 118 Mich., 497, 77 N. W., 13, 42 L. R. A., 407, 74 Am. St. Rep., 421; *Hawarden v. Y. & L. C. Co.*, 111 Wis., 545, 87 N. W., 472, 55 L. R. A., 828; *Cranford v. Tyrrell*, 128 N. Y., 341, 28 N. E., 514; *North Bloomfield G. M. Co. v. United States*, 32 C. C. A., 84, 88 Fed., 664; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala., 115, 4 So., 106.

<sup>19</sup> *Roberson v. Rochester F. B. Co.*, 171 N. Y., 538, 64 N. E., 442, 59 L. R. A., 478, 89 Am. St. Rep., 828; *Atkinson v. Doherty*, 121 Mich., 372, 80 N. W., 285, 46 L. R. A., 219, 80 Am. St. Rep., 507; *Cor-*

*liss v. Walker Co.*, 57 Fed., 434, 31 L. R. A., 283. And see *Schuyler v. Curtis*, 147 N. Y., 434, 42 N. E., 22, 31 L. R. A., 286, 49 Am. St. Rep., 671. In *Corliss v. Walker*, 64 Fed., 280, 31 L. R. A., 283, the court make the distinction, as to the existence of the right of privacy, between private and public characters. This distinction has been severely and, it seems, justly criticised. See *Atkinson v. Doherty* and *Roberson v. Rochester F. B. Co.*, *supra*.

<sup>20</sup> *Corliss v. Walker Co.*, 57 Fed., 434, 31 L. R. A., 283.

<sup>21</sup> *Roberson v. Rochester F. B. Co.*, 171 N. Y., 538, 64 N. E., 442, 59 L. R. A., 478, 89 Am. St. Rep., 828.

widow of a deceased husband can not restrain the use of his name and picture upon the wrapper of a brand of cigars manufactured and sold by the defendant.<sup>22</sup> Where, however, the publication of plaintiff's photograph would involve a breach of confidence and of a contractual relation, express or implied, equity, having undoubted jurisdiction to protect contract rights, may properly interfere to restrain such publication.<sup>23</sup> And upon the same principle that courts of equity are concerned only with the protection of property rights, they will not interpose the aid of injunction for the protection of rights which are of a purely political nature.<sup>24</sup> And where the sole question at issue is as to the right of a subordinate branch of a benevolent organization to be represented in the central body, equity will not lend its aid since no right of property is involved.<sup>25</sup>

§ 21. **Fraud as ground for relief.** Courts of equity in the exercise of their general jurisdiction for the prevention of fraud are often called upon to interfere by injunction where fraud constitutes the *gravamen* of the bill. The manifestations of fraud are so various that it is impossible to embrace all its varieties of form within the limits of a precise definition. Indeed the courts have generally avoided all attempts in this direction, and have reserved to themselves the liberty to deal with it in whatever aspect it may be presented by human ingenuity. The most frequent instances in which injunctions are granted upon the ground of fraud are in cases where relief is sought against proceedings at law, and to the chapters upon that subject the reader is referred for the principles which gov-

<sup>22</sup> *Atkinson v. Doherty*, 121 Mich., 372, 80 N. W., 285, 46 L. R. A., 219, 80 Am. St. Rep., 507. <sup>24</sup> *Fletcher v. Tuttle*, 151 Ill., 41, 37 N. E., 683, 25 L. R. A., 143. And see, *post*, § 1312.

<sup>23</sup> *Pollard v. Photographic Co.*, 58 L. J. N. S. Ch., 251; *Corliss v. Walker Co.*, 57 Fed., 434, 31 L. R. A., 283. <sup>25</sup> *Wellenvoss v. Grand Lodge*, 103 Ky., 415, 45 S. W., 360, 40 L. R. A. 488. In *Worlds Columbian Exposition v. United States*, 6 C.

ern the interference of equity in such cases.<sup>26</sup> Where fraud is relied upon as the foundation for an injunction, the allegations in the bill must be of specific and definite acts of fraud, and not mere general averments; and in the absence of such specific allegations a court of equity will not interfere, although irreparable injury is alleged.<sup>27</sup> Upon the other hand, it is unnecessary that fraud should be alleged in the pleadings in express terms if facts are averred from which it follows as a conclusion of law.<sup>28</sup>

§ 22. **Irreparable injury must be clearly shown.** An injunction, being the "strong arm of equity," should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity.<sup>29</sup> But by irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.<sup>30</sup> To justify the

C. A., 58, 56 Fed., 654 it was held that the United States could not enjoin the managers of what was known as the Chicago Worlds Fair from opening the exposition and grounds to the public on Sundays contrary to the act of congress appropriating certain money to aid in the construction of the exposition since the case did not involve any such property rights as were entitled to the protection of a court of equity. And in *Pearson v. Pearson*, 108 Fed., 461, it was held that the agents of a foreign government which was at war with another could not be enjoined from exporting munitions of war to their own government in alleged violation of the principles of international law, thereby prolonging the war and causing

consequent injury to plaintiff's property located near the seat of war, the issues involved in such case being purely political ones.

<sup>26</sup> See chapters II and III, *post*.

<sup>27</sup> *Powell v. Parker*, 38 Ga., 644; *Dickenson v. B. L. & I. Co.*, 93 Va., 498, 25 S. E., 548. And see *Brick v. Burr*, 47 N. J. Eq., 189, 19 Atl., 842.

<sup>28</sup> *Avery v. Job*, 25 Ore., 512, 36 Pac., 293; *Andrews v. King County*, 1 Wash., 46, 23 Pac., 409, 22 Am. St. Rep., 136.

<sup>29</sup> *Potter v. Schenck*, 1 Biss., 515; *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. (2 Stew.), 299.

<sup>30</sup> *Chicago General Ry. Co. v. C. B. & Q. R. Co.*, 181 Ill., 605, 54 N. E., 1026.

court in granting the relief it must be reasonably satisfied that there is an actual intention on the part of defendant to do the act which it is sought to enjoin, or that there is probable ground for believing that, unless the relief is granted, the act will be done. And it is not a sufficient ground for interfering that, if there be no such intention on the part of defendant, the injunction can do no harm.<sup>31</sup> Nor will the court interfere when the evidence shows that there is no probability of defendant doing the act which it is sought to restrain.<sup>32</sup> So if it is apparent upon an application for an injunction that the relief sought is disproportioned to the nature and extent of the injury sustained or likely to be sustained, the court will decline to interfere.<sup>33</sup> Nor will the relief be granted to prevent the commission of acts which, although unauthorized, yet produce no results injurious to plaintiff.<sup>34</sup> So the relief will not be granted unless the injury to the plaintiff is threatened or imminent or is in all probability about to be inflicted, and the writ will not issue merely to allow the fears or apprehension of the plaintiff where there is no showing or reasonable ground for believing that the defendant is about to commit the wrongs complained of or where it appears that he is without the opportunity or intention of so doing.<sup>35</sup> And an interlocutory injunction will not be allowed where the right which plaintiff seeks to have protected is in doubt or where the injury which will result from the invasion of that right is not irreparable.<sup>36</sup> And upon an interlocutory application for an injunction and a receiver to take possession of property *pendente lite*, plaintiff

<sup>31</sup> *Dunn v. Bryan*, 1. R. 7 Eq., 143.

<sup>32</sup> *Lord Cowley v. Byas*, 5 Ch. D., 944.

<sup>33</sup> *Hall v. Rood*, 40 Mich., 46; *Lynch v. Union Institution*, 159 Mass., 306, 34 N. E., 364, 20 L. R. A., 842; *Amerman v. Deane*, 132 N. Y., 355, 30 N. E., 741, 28 Am. St. Rep., 584.

<sup>34</sup> *McLaughlin v. Sandusky*, 17 Neb., 110, 22 N. W., 241.

<sup>35</sup> *Lester Real Estate Co. v. City of St. Louis*, 169 Mo., 227, 69 S. W., 300; *Reynolds v. Everett*, 144 N. Y., 189, 39 N. E., 72.

<sup>36</sup> *Hagerty v. Lee*, 45 N. J. Eq., 255, 17 Atl., 826; *Amos v. Norcross*, 58 N. J. Eq., 256, 43 Atl., 195.

must not only show a case of adverse and conflicting claims to the property and one of equitable cognizance, but he must also show some emergency or danger of loss requiring immediate action; and the danger must be clear and the right of plaintiff free from reasonable doubt to warrant the interposition of the court.<sup>37</sup>

§ 23. **Injunction not corrective of past injuries.** The appropriate function of the writ of injunction is to afford preventive relief only, and not to correct injuries which have already been committed, or to restore parties to rights of which they have already been deprived. It is not, therefore, an appropriate remedy to procure relief for past injuries, and it is only to be used for the prevention of a future injury actually threatened, and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages. And if the act sought to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act.<sup>38</sup> But where the act sought to be enjoined is only partially completed, an injunction will lie to restrain the completion of the threatened injury.<sup>39</sup> And where suit is begun before the doing of the wrongful act and during the pendency

<sup>37</sup> *Beecher v. Bininger*, 7 Blatch., 170.

<sup>38</sup> *Menard v. Hood*, 68 Ill., 121; *Lake Shore & Michigan Southern Ry. Co. v. Taylor*, 134 Ill., 603, 25 N. E., 588; *Owen v. Ford*, 49 Mo., 436; *Carlin v. Wolff*, 154 Mo., 539, 51 S. W., 679, 55 S. W., 441; *Chesapeake & O. R. Co. v. Patton*, 5 West Va., 234; *People v. Clark*, 70 N. Y., 518; *Cole v. Duke*, 79 Ind., 107; *Georgia Pacific Railway v. Mayor*, 75 Ga., 828; *Trevigne v. School Board*, 31 La. An., 105; *Street Railroad Co. v. Wildman*, 58 Mich., 286, 25 N. W., 193; *Smith*

*v. Davis*, 22 Fla., 405; *Ewing v. Rourke*, 14 Ore., 514, 13 Pac., 483; *Gardner v. Stroeveer*, 81 Cal., 148, 22 Pac., 483, 6 L. R. A., 90; *City of Alma v. Loehr*, 42 Kan., 368, 22 Pac., 424; *Manufacturers Outlet Co. v. Longley*, 20 R. I., 86, 37 Atl., 535; *Kohn v. Old T. M. Co.*, 2 Utah, 13; *Cecil Natl. Bank v. Thurber*, 8 C. C. A., 365, 59 Fed., 913; *Mexican Ore Co. v. Mexican G. M. Co.*, 47 Fed., 351. See also *Mayor v. Mitchell*, 79 Ga., 807, 5 S. E., 201.

<sup>39</sup> *Newell v. Sass*, 142 Ill., 104, 31 N. E., 176.



of the suit the act is done by the defendant, the court will not thereby be deprived of its jurisdiction.<sup>40</sup> And where a mandatory injunction is sought to compel the defendant to remove an obstruction to a public highway, the removal by the defendant during the pendency of the suit will not deprive the plaintiff of the right to a final judgment since the defendant might again replace and maintain the obstruction.<sup>41</sup>

§ 24. **Relief in cases of trust.** Under the established jurisdiction of equity in matters of trust and its power to enforce by trustees the proper performance of their duties, the court may enjoin trustees from proceeding in disregard of the conditions necessary to the proper exercise of their authority, or from an improper use of such authority, there being no adequate remedy at law.<sup>42</sup> Thus, a trustee who is proceeding to sell real estate without having given the bond required of him by the instrument creating the trust, may be restrained from proceeding with such sale.<sup>43</sup> So a *cestui que trust* may enjoin his trustees from selling the trust property upon conditions which are unfavorable to its sale and which are calculated to depreciate the value of the property.<sup>44</sup> So where a policy of life insurance is assigned to a trustee for the benefit of a minor, an attempt by the trustee to procure the money for his own use would seem to afford sufficient ground for an injunction until the hearing.<sup>45</sup> And upon a bill charging a trustee with maladministration of his trust, and alleging that acts are threatened which would be irremediable if committed, it is proper to grant a preliminary injunction without notice to defendant.<sup>46</sup> And it is proper to continue until the final hearing an injunction to retain in the hands of the court con-

<sup>40</sup> *Lewis v. Town of North Kingstown*, 16 R. I., 15, 11 Atl., 173, 27 Am. St. Rep., 724.

<sup>41</sup> *McFarland v. Lindekugel*, 107 Wis., 474, 83 N. W., 757.

<sup>42</sup> *State v. Maury*, 2 Del. Ch., 141; *Pool v. Potter*, 63 Ill., 533.

<sup>43</sup> *Pool v. Potter*, 63 Ill., 533.

<sup>44</sup> *Dance v. Goldingham*, L. R. 8 Ch., 902.

<sup>45</sup> *Fernie v. Maguire*, 6 Ir. Eq., 137.

<sup>46</sup> *Davis v. Browne*, 2 Del. Ch., 188.

trol of a trust fund, pending a controversy as to the reformation of a judgment, the testimony being conflicting as to the rights of the parties.<sup>47</sup>

§ 25. **Jurisdiction cautiously exercised against trustees.**

But while the protection of trusts is a favorite branch of the jurisdiction of equity, great care is to be exercised in granting injunctions against trustees, lest by tying their hands the trust estate may be left without any representative. Nothing but a case of pressing necessity and imminent probability of great danger from delay will justify a court of equity in divesting a trustee of his trust until he has had an opportunity of answering.<sup>48</sup> And an injunction will not be awarded in the first instance against an executor or trustee upon mere general charges in the bill that he has abused and violated his trust.<sup>49</sup> Nor is the fraudulent abuse of their trust by the directors of a banking corporation respecting the election of directors sufficient ground to warrant a court of equity in interfering, there being no charge of abuse of trust or fraud in the management of the ordinary financial concerns of the bank.<sup>50</sup> And while equity may enjoin a trustee who has been guilty of gross misconduct from the custody of the trust funds, yet there must be probable danger of waste or loss before the relief will be allowed and the legal right of the trustee be displaced.<sup>51</sup> And the court will not by an interlocutory injunction restrain the transfer of an alleged trust fund, when defendant denies that it is a trust fund, and when the right to deal with it is the question to be determined upon the final hearing.<sup>52</sup> And a creditor who is entitled to the benefit of a trust fund for the payment of his demand, with others, is not

<sup>47</sup> *Morris v. Willard*, 84 N. C., 293.

<sup>50</sup> *Ogden v. Kip*, 6 Johns. Ch., 160.

<sup>48</sup> *Boyd v. Murray*, 3 Johns. Ch., 48; *Ogden v. Kip*, 6 Johns. Ch., 160.

<sup>51</sup> *Satterfield v. John*, 53 Ala., 127.

<sup>49</sup> *Boyd v. Murray*, 3 Johns. Ch., 48.

<sup>52</sup> *Bank of Turkey v. Ottoman Co.*, L. R. 2 Eq., 366.

entitled to enjoin the trustee from paying any part of the trust fund absolutely, but only from making payment until such creditor is paid.<sup>53</sup>

§ 26. **Rights of petition rarely enjoined.** The jurisdiction of equity over the right of petition and its authority to restrain corporations from invoking legislative action have been the subject of some contention and have given rise to an apparent want of harmony in the adjudicated cases. While the power of equity to restrain the exercise of the right of petition to parliament by a corporate body for a change in its powers has been asserted by some of the English decisions,<sup>54</sup> it is difficult to conceive of a case in which the exercise of such power would be proper, in the absence of any abuse of corporate power or misapplication of corporate funds. And a corporation will not be enjoined at the suit of a shareholder from applying to parliament in its corporate capacity, by petition under its corporate seal, for an extension of its powers, the right to take such action being regarded as an incident to its powers.<sup>55</sup> Nor will an injunction be granted in such case upon the ground that, in the opinion of the complaining shareholders, the measure whose enactment is sought is inexpedient.<sup>56</sup> So the trustees of a corporation which is incorporated in a foreign country will not be enjoined from applying to the legislature of that country for power to increase the capital stock of the company.<sup>57</sup> And equity will not interfere by injunction with the right to petition parliament for special legislation to supersede the rules of property by which the

<sup>53</sup> *Carter v. City of New Orleans*, 19 Fed., 659.

<sup>54</sup> See *In re London, Chatham & Dover Railway Arrangement Act*, L. R. 5 Ch. App., 671; *Lancaster & C. R. Co. v. The North Western R. Co.*, 2 Kay & J., 293; *Heathcote v. North Staffordshire R. Co.*, 2 Mac. & G., 100.

<sup>55</sup> *Ware v. Grand Junction W. Co.*, 2 Russ. & M., 470. See *Great Western R. Co. v. Rushout*, 5 DeG. & Sm., 290.

<sup>56</sup> *In re London, Chatham & Dover Railway Arrangement Act*, L. R. 5 Ch. App., 671.

<sup>57</sup> *Bill v. Sierra Nevada Co.*, 1 DeG., F. & J., 177.

citizen is bound, whether by contract or otherwise.<sup>58</sup> Where, however, municipal officers, in disregard of the requirements of their act of incorporation, have made an unauthorized application to parliament for the passage of a bill concerning their municipal affairs, an injunction has been allowed in behalf of tax payers to restrain such officers from causing the application to be made in their corporate capacity and from defraying its expenses out of corporate funds.<sup>59</sup> But in this country the jurisdiction has not been recognized, and it has been held that equity will not interfere with or enjoin the exercise of the right to petition the legislature upon any matter of public or private concern.<sup>60</sup>

§ 27. **Foreign sovereign entitled to protection.** A foreign sovereign is entitled to the aid of equity by injunction in a proper case for the protection of his property rights. And where such sovereign shows by his bill that defendants are about to introduce into his country a large quantity of spurious paper money for circulation, which will greatly injure plaintiff and his subjects, an injunction may be allowed. But equity interferes in such case, not for the prevention of illegal or criminal acts as such, or upon political grounds, but only for the prevention of injury to property and property rights.<sup>61</sup>

§ 28. **Injunction refused where legal remedy adequate.** It is always a sufficient objection to the granting of an injunc-

<sup>58</sup> *Heathcote v. North Staffordshire R. Co.*, 2 Mac. & G., 100. And in *Lancaster & C. R. Co. v. The North Western R. Co.*, 2 Kay & J., 293, the court refused to restrain a railway company from applying to parliament for power to make a deviation from the line as originally established in violation of an agreement made with the plaintiff company, the refusal being based upon grounds of public benefit.

<sup>59</sup> *Attorney-General v. Commissioners of Kingstown*, 1 R. 7. Eq., 383. See also *Attorney-General v. Mayor of Waterford*, 1 R. 9 Eq., 522; *Solicitor-General v. Lord Mayor of Dublin*, 1 L. R. Ir. Ch. D., 166.

<sup>60</sup> *Story v. Jersey City & B. P. R. Co.*, 1 C. E. Green, 13.

<sup>61</sup> *Emperor of Austria v. Day and Kossuth*, 3 DeG., F. & J., 217, affirming S. C., 2 Gif., 628.

tion that the party aggrieved has a full and adequate remedy at law, and it is a well established rule that courts of equity will not lend their aid for the protection of rights or the prevention of wrongs where the ordinary legal tribunals are capable of affording sufficient redress.<sup>62</sup> And where it does not appear that the remedy at law is inadequate, or that the party aggrieved is entitled to more speedy relief than can be obtained by the ordinary process of courts of law, an injunction will be refused.<sup>63</sup> Thus, where complainant's equity is based upon a claim for unliquidated damages for a substantive injury for which ample remedy exists at law, and there is no impediment to bringing the action in a legal forum, an injunction will not be granted.<sup>64</sup> So where the controversy concerns the title to personal property, the removal of the property will not be enjoined when full and adequate relief may be had at law.<sup>65</sup> So equity will not interfere by injunc-

<sup>62</sup> *Coe v. Columbus, P. & I. R. Wis.*, 426, 53 N. W., 678; *Mobile Co.*, 10 Ohio St., 372; *Coughron v. & G. R. Co. v. A. M. R. Co.*, 87 Swift, 18 Ill., 414; *Winkler v. Ala.*, 520, 6 So., 407; *Winter v. Winkler*, 40 Ill., 179; *Bodman v. City Council*, 93 Ala., 539, 9 So., 366; *Highland A. & B. R. Co. v. Lake Fork Drainage District*, 132 Ill., 439, 24 N. E., 630; *Chicago, R. I. & P. R. Co. v. City of Chicago*, 143 Ill., 641, 32 N. E., 178; *Poage v. Bell*, 3 Rand., 586; *Webster v. Couch*, 6 Rand., 519; *Akrill v. Selden*, 1 Barb., 316; *Sherman v. Clark*, 4 Nev., 138; *Mullen v. Jennings*, 1 Stockt., 192; *Wooden v. Wooden*, 2 Green Ch., 429; *Hoboken Ferry Co. v. Baldwin*, 58 N. J. Eq., 36, 43 Atl., 417; *Richards v. Kirkpatrick*, 53 Cal., 433; *Frazier v. White*, 49 Md., 1; *City of Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W., 628; *Welde v. Scot-*

*ten*, 59 Md., 72; *Hettrick v. Page*, 82 N. C., 65; *Moore v. Steelman*, 80 Va., 331; *Tumlin v. Vanhorn*, 77 Ga., 315, 3 S. E., 264; *Wolf River L. Co. v. Pelican B. Co.*, 83

*But in Tennessee a contrary rule would seem to prevail. See Williams v. Pile*, 104 Tenn., 273, 56 S. W., 833; *Alexander v. Henderson*, 105 Tenn., 431, 58 S. W., 648.

<sup>63</sup> *Mullen v. Jennings*, 1 Stockt., 192; *Hart v. Marshall*, 4 Minn., 294.

<sup>64</sup> *Webster v. Couch*, 6 Rand., 519.

<sup>65</sup> *Moore v. Steelman*, 80 Va., 331.



tion in aid of the right of stoppage *in transitu*, but will leave the parties to their legal remedies.<sup>66</sup> So the negotiation of a promissory note will not be enjoined upon the ground that the note has been materially altered since its execution and delivery, as that fact would constitute a good defense to an action at law upon the note even as against an innocent purchaser.<sup>67</sup> So equity will not enjoin the payment of a warrant issued upon a claim which has been duly allowed by a county board where the statute gives the taxpayer the right of appeal to the district court from the allowance of any claim against the county.<sup>68</sup> So equity will not, by mandatory injunction, compel the doing of an act where its performance may be accomplished by the legal remedy of *mandamus*.<sup>69</sup> And when it is apparent on the face of the bill that a court of chancery has no jurisdiction of the subject-matter of the cause, and that the party aggrieved has an adequate remedy at law, the bill is obnoxious to a demurrer.<sup>70</sup> But where the defendant has answered and has gone to a hearing upon the merits without raising the objection of an adequate remedy at law, such objection is deemed to have been waived and it is therefore error for the court, after such a hearing, to dismiss the bill because of the existence of a legal remedy.<sup>71</sup> And it has even been held that the defense is not available where, although raised by the pleadings, it was not pressed until the case reached the reviewing court and in the meantime a long and expensive hearing had been had on the merits.<sup>72</sup>

<sup>66</sup> Goodhart v. Lowe, 2 Jac. & W., 349.      quard v. Indian Grave Drainage District, 16 C. C. A., 530, 69 Fed., 867.

<sup>67</sup> Erickson v. First National Bank, 44 Neb., 622, 62 N. W., 1078.      <sup>70</sup> Winkler v. Winkler, 40 Ill., 28 L. R. A., 577, 48 Am. St. Rep., 179.

<sup>68</sup> Taylor v. Davey, 55 Neb., 153, 75 N. W., 553.      <sup>71</sup> St. Paul & S. C. R. Co. v. Robinson, 41 Minn., 394, 43 N. W., 75.

<sup>69</sup> New York & Greenwood L. R. Co. v. Township of Montclair, 47 N. J. Eq., 591, 21 Atl., 493; Co-      <sup>72</sup> Williams v. Concord Church, 193 Pa. St., 120, 44 Atl., 272; Driscoll v. Smith, 184 Mass., 221, 68 N. E., 210.

§ 29. **Statutory remedy a bar; when objection of legal remedy to be taken.** Where a positive statutory remedy exists for the redress of particular grievances, a court of equity will not interfere by injunction and assume jurisdiction of the questions involved; nor will it enjoin proceedings under such statutory remedy, since such interference would place the judicial above the legislative power of the government.<sup>73</sup> Legal rights should be left to the decision of a legal forum, and in the absence of special circumstances warranting the interposition of the extraordinary aid of courts of equity, such courts will not interfere to protect a purely legal right, prop-

<sup>73</sup> Brown's Appeal, 66 Pa. St., 155; Hornesby v. Burdell, 9 S. C., 303. In Brown's Appeal, a landlord had begun proceedings before a justice of the peace, in pursuance of a statutory remedy, to recover possession of premises demised. Before judgment the proceedings were enjoined in the common pleas. Thompson, C. J., says: "The landlord and tenant act of 1863 provides an ample remedy whereby to recover possession of leased premises when it is alleged that the term has expired. It is not a one-sided remedy, for it allows the defendant ample scope to allege and prove any legal defense he may have against the plaintiff's demand, with the right of review by appeal or *certiorari*. It is a complete system for that species of controversy. I do not know that it is a wise system—that may be doubted; but it is complete in itself. Proceedings under this system were legally and regularly begun by the defendants, as appears by the records before us; but before a final

result was arrived at the court of common pleas interposed by injunction and stopped them. The reason assigned for this was supposed hardship upon the plaintiffs, if the plaintiffs in the proceeding repossessed themselves of what they had leased to the defendants. This was manifest interference without authority of law. The court had no jurisdiction in equity of the proceedings. They were not contrary to law; and if they had been, an injunction was not a correctional process. That was to be done by the process provided in the act, viz.: by appeal or *certiorari*. These were the legal matters provided in the act, and a court of equity could not supplement them. Courts may restrain acts contrary to law, but not where they are according to positive law. That would be to put the courts above the legislature. Where a positive statutory remedy exists and may be pursued, equity can not interfere on the ground of irreparable mischief. The 'law injures no one' is a maxim which

erly triable at law.<sup>74</sup> And the assertion of a right whose existence or non-existence is properly determinable at law, and the exercise of which can do no injury to the party denying the existence of the right, affords no ground for equitable interference.<sup>75</sup> And in the courts of the United States the objection to granting relief by injunction, that the party aggrieved has ample remedy at law, need not be taken in the pleadings, but may be enforced by the court *sua sponte*, since it goes to the jurisdiction of the forum.<sup>76</sup> It is to be observed, however, that by a legal remedy within the meaning of the rule, which will operate as a bar to relief in equity by injunction, is meant a remedy which can be found in the courts of the same state; and that is not an adequate legal remedy of which the person aggrieved can avail himself only by going into a foreign jurisdiction.<sup>77</sup> And where a remedy exists in equity, a subsequent statutory grant of a legal remedy will not deprive a court of equity of its jurisdiction unless

inculcates obedience to law. Where positive law in point of fact injures, it is the legislature which must furnish the corrective; courts can not. Irreparable damages can not be alleged against statutory remedies legally pursued, and that was the case with the plaintiffs before the magistrate. These principles are plain and need neither authority nor elaboration to substantiate. We think the court below had no jurisdiction in equity to restrain these defendants from proceedings under the landlord and tenant act referred to to try their right to repossess themselves of the leased premises in question. The decree in the case is therefore reversed, and the bill is dismissed at the cost of the appellees." See *Attorney-General v. Ashborne R. G. Co.*,

(1903) 1 Ch., 101; *Richardson v. Murphy*, (1899) 1 L. R. Ir., 248.

<sup>74</sup> *Wooden v. Wooden*, 2 Green Ch., 429.

<sup>75</sup> *Doughty v. Somerville & E. R. Co.*, 3 Halst. Ch., 51.

<sup>76</sup> *Allen v. Car Co.*, 139 U. S., 658, 11 Sup. Ct. Rep., 682; *Hoey v. Coleman*, 46 Fed., 221; *Parker v. Winnipiseogee L. C. & W. Co.*, 2 Black, 545. The decision is based upon the sixteenth section of the judiciary act of 1789, R. S. U. S., § 723, which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy can be had at law." But see *Foltz v. St. L. & S. F. Ry. Co.*, 8 C. C. A., 635, 60 Fed., 316.

<sup>77</sup> *Stanton v. Embry*, 46 Conn., 595.

the equitable remedy is extinguished by some positive prohibitory provision of the statute.<sup>78</sup> And where a suit pending upon the equity side of a federal court is one which properly entitles the plaintiff to relief by injunction according to the established principles of that court, it constitutes no bar to the jurisdiction that the plaintiff has, under the laws of the state where the suit is pending, an adequate remedy at law upon the same cause of action. The statutes of a state can not oust the federal courts of a jurisdiction which is vested in them under the established usages and practice of those courts.<sup>79</sup>

§ 30. **Remedy at law defined.** The mere existence, however, of a remedy at law is not in itself sufficient ground for refusing relief in equity by injunction; nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity. To deprive a plaintiff of the aid of equity by injunction it must also appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law.<sup>80</sup> But by a plain and adequate

<sup>78</sup> *Woodward v. Woodward*, 143 Mo., 241, 49 S. W., 1001.

<sup>79</sup> *Smyth v. Ames*, 169 U. S., 466, 18 Sup. Ct. Rep., 418; *Third National Bank v. Mylin*, 76 Fed., 385.

<sup>80</sup> *Watson v. Sutherland*, 5 Wal., 74; *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, 19 Sup. Ct. Rep., 77; *Irwin v. Lewis*, 50 Miss., 363; *Beaser v. City of Ashland*, 89 Wis., 28, 61 N. W., 77; *Welton v. Dickson*, 38 Neb., 767, 57 N. W., 559, 22 L. R. A., 496, 41 Am. St. Rep., 771; *Kellogg v. King*, 114

Cal., 378, 46 Pac., 166, 55 Am. St. Rep., 74; *Coler v. Board of Commissioners*, 89 Fed., 257; *Bank of Kentucky v. Stone*, 88 Fed., 383; *Drew v. Town of Geneva*, 150 Ind., 662, 50 N. E., 871, 48 L. R. A., 814; *La Mothe v. Fink*, 12 Chicago Legal News, 152; *Foltz v. St. L. & S. F. Ry. Co.*, 8 C. C. A., 635, 60 Fed., 316; *Driscoll v. Smith*, 184 Mass., 221, 68 N. E., 210. And see *Boyce's Ex'rs v. Grundy*, 3 Pet., 210; *Sloane v. Clauss*, 64 Ohio St., 125, 59 N. E., 884.

remedy at law within the meaning of the rule is not meant the right to resort to every remedy given by the forms of legal procedure; and if any form of action at law will afford a complete and adequate remedy the case falls within the principle which tests the right to resort to equity, and the court will refuse to interfere by injunction.<sup>81</sup> And, ordinarily, an injury is not considered irreparable within the meaning of the rule when the loss complained of may be made good by the payment of money, or when the party aggrieved may be fully reinstated in the position which he has lost by the act in question.<sup>82</sup> But the remedy at law will not be regarded as adequate if its adequacy is dependent upon the will of the opposing party.<sup>83</sup>

§ 31. **How injunction granted.** Interlocutory injunctions are usually, though not always, granted upon the filing of a bill setting forth complainant's equities and concluding with a prayer for the relief. Where, however, a court of equity has already acquired jurisdiction over the subject-matter of the action and of the parties thereto, it would seem that no bill is necessary. And wherever the court has power to make an order which a party to the action is bound to obey, in consequence of his being either actually or constructively a party to the suit, it may enforce obedience to its order by the process of injunction issued upon a petition in the cause without the filing of a bill.<sup>84</sup> But the writ will not be allowed in an improper case, even by the consent of both parties, especially where the rights of third persons intervene.<sup>85</sup>

§ 32. **When new suit unnecessary.** Where an injunction is sought merely as auxiliary to an action already begun, and

<sup>81</sup> *La Mothe v. Fink*, 12 Chicago Legal News, 152.

<sup>83</sup> *Bank of Kentucky v. Stone*, 88 Fed., 383.

<sup>82</sup> *Crescent City L. S. L. & S. H. Co. v. Police Jury*, 32 La. An., 1192; *Irwin v. Great S. T. & T. Co.*, 36 La. An., 772.

<sup>84</sup> *In the Matter of Hemiup*, 2 Paige, 316.

<sup>85</sup> *Whelpley v. Erle R. Co.*, 6 Blatch., 271.



the object desired can be as readily obtained by a motion in the original action, a new suit will not be entertained which is instituted for the sole purpose of obtaining such injunction, since the exercise of the jurisdiction under such circumstances would be an encouragement to vexatious litigation.<sup>86</sup>

§ 33. **Not granted against persons beyond jurisdiction; when granted against persons within the jurisdiction though the res is beyond.** The jurisdiction of equity by way of injunction being, as we have already seen, strictly *in personam*, it will not be exercised against persons and property beyond the borders of the state in which the proceedings are instituted. Neither law nor comity between distinct state governments recognizes the authority of one state to exercise jurisdiction over citizens and property beyond its borders.<sup>87</sup> Nor will equity attempt by injunction to restrain a non-resident defendant, who has not been served with process, and who is not subject to the jurisdiction of the court, from performing some act beyond the state, even though there has been constructive service by publication as to such defendant.<sup>88</sup> But where the court has jurisdiction of the defendants, either by personal service of process or by voluntary appearance in the case of non-residents, an injunction may be granted to restrain a trespass or other threatened injury to property located beyond the territorial jurisdiction of the court.<sup>89</sup> It is to be observed, however, that the relief is confined to cases where the injunction operates strictly *in personam* and that it will not be granted where the enforcement of the court's decree may require the execution of some process of the court operating upon the subject-matter of the suit and having no

<sup>86</sup> *Hamer v. Kane*, 7 Nev., 61.

<sup>87</sup> *Western Union T. Co. v. Pacific & A. T. Co.*, 49 Ill., 90.

<sup>88</sup> *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga., 13.

<sup>89</sup> *Munson v. Tryon*, 6 Phila.,

395; *Jennings v. Beale*, 158 Pa.

St., 283, 27 Atl., 948; *Clad v. Paist*, 181 Pa. St., 148, 37 Atl., 194;

*Schmaltz v. York Mfg. Co.*, 204 Pa. St., 1, 53 Atl., 522, 59 L. R. A.,

907, 93 Am. St. Rep., 782.

extra-territorial effect.<sup>90</sup> But an injunction does not affect the rights of third parties which have been acquired in good faith when they are not parties or privies to the suit.<sup>91</sup>

§ 34. **Positive averments of fact necessary.** An injunction being a harsh remedy will not be granted in the first instance except upon a clear *prima facie* case and upon positive averments of the equities on which the application for the relief is based. And while it is not essential that complainant should establish his case upon an application for an interlocutory injunction with the same degree of certainty that would be required upon the final hearing, he must nevertheless allege positively the facts constituting his grounds for relief.<sup>92</sup> Thus, it is well established that the mere allegation of irreparable injury will not suffice to warrant an injunction, but the facts must appear on which the allegation is predicated in order that the court may be satisfied as to the nature of the injury.<sup>93</sup> And such allegations, being merely the legal conclusions of the pleader, are not admitted by demurrer,<sup>94</sup> nor by the failure of the defendant to deny them.<sup>95</sup> Nor will

<sup>90</sup> *Munson v. Tryon*, 6 Phila., 395; *Clad v. Paist*, 181 Pa. St., 148, 37 Atl., 194.

<sup>91</sup> *Roberts v. Davidson*, 83 Ky., 279.

<sup>92</sup> *Jones v. Macon & B. R. Co.*, 39 Ga., 138; *Perkins v. Collins*, 2 Green Ch., 482; *Holdrege v. Gwynne*, 3 C. E. Green, 26; *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9 Paige, 305; *Bogert v. Haight*, Ib., 297; *McHenry v. Jewett*, 90 N. Y., 58.

<sup>93</sup> *Branch v. Supervisors*, 13 Cal., 190; *Leitham v. Cusick*, 1 Utah, 242; *McGregor v. Silver King Mining Co.*, 14 Utah, 47, 45 Pac., 1091, 60 Am. St. Rep., 883;

*McHenry v. Jewett*, 90 N. Y., 58; *Brass v. Rathbone*, 153 N. Y., 435, 47 N. E., 905; *Portland v. Baker*, 8 Ore., 356; *State v. Wood*, 155 Mo., 425, 56 S. W., 474, 48 L. R. A., 596; *Illinois Central R. Co. v. City of Chicago*, 138 Ill., 453, 28 N. E., 740; *Chicago Public Stock Exchange v. McClaghry*, 148 Ill., 372, 36 N. E., 88; *Otis v. Sweeney*, 48 La. An., 940, 20 So., 229; *Burrus v. City of Columbus*, 105 Ga., 42, 31 S. E., 124; *Farland v. Wood*, 35 W. Va., 458, 14 S. E., 140; *Becker v. McGraw*, 48 W. Va., 539, 37 S. E., 532.

<sup>94</sup> *Beatty v. Smith*, 14 S. Dak., 24, 84 N. W., 208.

<sup>95</sup> *McCormick v. Riddle*, 10 Mont., 467, 26 Pac., 202.

merely argumentative allegations, or inferences from the facts stated, suffice to meet the requirements of the rule.<sup>96</sup> So when an injunction is sought upon the ground of fraud it is not sufficient that the averments should be upon information and belief, but they should be positive, and founded upon plaintiff's own knowledge or that of some person cognizant of the facts.<sup>97</sup> And in the absence of positive allegations that the injury complained of has already been inflicted or is threatened, relief will be denied.<sup>98</sup> So a bill which is wanting in definite and positive averments of facts upon which the right to relief is based, is bad upon demurrer.<sup>99</sup>

§ 35. **Allegations on information and belief insufficient.** The relief will not ordinarily be allowed where the facts upon which complainant's equities rest are stated only upon information and belief, but they should be made to appear by positive averments founded on complainant's own knowledge,<sup>1</sup> or that of some person cognizant of the facts.<sup>2</sup> Nor will it suffice that the averments of the bill are made upon the information of the party complaining without stating his sources of information.<sup>3</sup> And an injunction granted *ex parte*, where some of the material allegations of the bill are stated on information and belief, can not be sustained in the absence of proof of their correctness. To sustain an injunction granted without notice all the essential and material allegations which are not positively stated in the bill must be otherwise proved.<sup>4</sup> Where, however, the injunction is granted upon notice to defendant of the motion, the fact that many of the material averments of the bill are stated upon information and belief

<sup>96</sup> *Battle v. Stephens*, 32 Ga., 25. *Minn.*, 49; *Farland v. Wood*, 35 W.

<sup>97</sup> *Brooks v. O'Hara*, 8 Fed., 529. *Va.*, 458; 14 S. E., 140.

<sup>98</sup> *Buck v. Backarack*, 45 N. J. 2 *Youngblood v. Schamp*, 2 McEq., 123, 17 Atl., 548. *Cart.*, 42.

<sup>99</sup> *Blakeslee v. M. P. R. Co.*, 43 3 *Blondheim v. Moore*, 11 Md., Neb., 61, 61 N. W., 118. 365.

<sup>1</sup> *Jones v. Macon & B. R. Co.*, 39 4 *Dinehart v. Lafayette*, 19 Wis., Ga., 138; *Armstrong v. Sanford*, 7 677.

will not prevent the granting of the relief where defendant in no manner denies such averments.<sup>5</sup> Nor do the mere apprehensions and fears of complainant, unsustained by facts establishing their probability, constitute a sufficient ground to warrant the interference of equity by injunction, since such fears may exist without any substantial reason. Not the complainant, therefore, but the court, must be satisfied that a wrong is about to be committed which will be irreparable in its nature before the relief will be allowed.<sup>6</sup>

§ 36. **When verification dispensed with.** Although it is generally requisite that an injunction bill should be verified by the oath of complainant or other person cognizant of the facts, yet this is not in all cases indispensable. It will suffice if the confidence of the court is obtained, and this may be done as well by documentary evidence, where such evidence satisfactorily establishes complainant's equities.<sup>7</sup> And if it is apparent upon a final hearing that complainant is entitled to an injunction, it will not be refused because the bill is not verified.<sup>8</sup> But the relief will not be allowed upon a bill whose material averments are all denied by the answer of defendants under oath.<sup>9</sup> If, however, the bill charges forgery as one of the grounds for relief, a denial in the answer, upon information and belief, will not prevent the issuing of the writ.<sup>10</sup>

§ 37. **Precision required in writ; form not essential; no objection that case is without precedent.** The writ of injunction should contain a description of the particular things or acts concerning which the defendant is enjoined, in order that there may be no opportunity for misapprehension.<sup>11</sup> No particular form, however, is required, and the writ will, of course,

<sup>5</sup> *Gibson v. Gibson*, 46 Wis., 462.

<sup>9</sup> *Lady Bryan v. Lady Bryan*, 4

<sup>6</sup> *Warfield v. Owens*, 4 Gill, 364;  
*Goodwin v. New York, N. H. & H.*  
*R. Co.*, 43 Conn., 494.

*Nev.*, 414.

<sup>10</sup> *United States v. Parrott*, Mc-  
All. C. C., 271.

<sup>7</sup> *Negro Charles v. Sheriff*, 12  
Md., 274.

<sup>11</sup> *Whipple v. Hutchinson*, 4  
Blatch., 190.

<sup>8</sup> *Hawkins v. Hunt*, 14 Ill., 42.

be varied to meet the peculiar circumstances of each particular case. It is sufficient that it be an authentic notification to the defendant of the mandate of the court, which he must then obey at his peril.<sup>12</sup> It is never an objection to the granting of an injunction that the case is without precedent upon its facts if it is one which falls within established principles of equity jurisdiction and beneficial results follow from the granting of the writ.<sup>13</sup> Indeed, in many cases such as those involving fraud, where the manifestations of the injury are as varied as the ingenuity of the human mind, to require a precedent as a condition to the granting of relief would often be a complete denial of the relief itself and a consequent failure of justice in a case which was properly one of equitable cognizance.

§ 38. **Injunction may be allowed though not prayed.** The court may, under certain circumstances, grant an injunction upon the final hearing of the cause, although not prayed for by the bill.<sup>14</sup> And it has been held that after a decree in a foreclosure suit, the mortgagor in possession may be restrained from committing waste, although no injunction was sought by the bill.<sup>15</sup> And the plaintiff may be entitled to a preliminary injunction although a final injunction is not prayed where other appropriate relief is asked which is substantially equivalent to a permanent injunction.<sup>16</sup>

§ 39. **When injunction revived or reinstated.** It is within the discretion of a court of equity to revive an injunction after it has been dissolved; and upon a proper showing of complainant's right to relief the injunction will be reinstated, the court being regarded as always open for this purpose.<sup>17</sup>

<sup>12</sup> *Summers v. Farish*, 10 Cal., 347.

<sup>14</sup> *Blomfield v. Eyre*, 8 Beav., 250.

<sup>15</sup> *Goodman v. Kine*, 8 Beav., 379.

<sup>13</sup> *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed., 746.

<sup>16</sup> *Hamilton v. Wood*, 55 Minn., 482, 57 N. W., 208.

<sup>19</sup> *L. R. A.*, 395; *Nashville, C. & St. L. Co. v. McConnell*, 82 Fed., 65.

<sup>17</sup> *Tucker v. Carpenter*, *Hemp*, 441; *Radford's Ex'rs v. Innes' Executrix*, 1 Hen. & Mun., 8; *Bil-*



And where sufficient facts are stated in a supplemental bill to warrant an injunction, it will be granted, although the injunction granted on the original bill has been dissolved.<sup>18</sup> And when an interlocutory injunction is allowed, but the bill is afterward dismissed for want of prosecution, the final order of dismissal does not operate as *res judicata* upon the questions involved.<sup>19</sup> But when a second bill is filed to obtain a second injunction in relation to the same subject-matter and between the same parties, it is not enough to allege new grounds of equity not suggested in the former bill; it must be shown that the new equity alleged did not exist at the time the original bill was filed, or, if it existed, that it was unknown to the complainant.<sup>20</sup> Nor will an injunction once dissolved be reinstated simply upon new evidence, no new ground of equity being stated which was not alleged in the original bill.<sup>21</sup>

§ 40. **New injunction not allowed on same equities.** Under a statute prohibiting a second *ex parte* application to an officer out of court, after the court has refused an injunction, complainant will not be allowed the relief upon a new bill substantially the same as the first.<sup>22</sup> So if, after argument,

*lingslea v. Gilbert*, 1 Bland, 568. In *Tucker v. Carpenter*, Johnson, J., delivering the opinion of the court, says: "A writ of injunction may be said to be a process capable of more modifications than any other in the law; it is so malleable that it may be molded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications for the purpose of dispensing complete justice between the parties. It may be special, preliminary, temporary or perpetual; and it may be dissolved, revived,

continued, extended or contracted; in short, it is adapted and used by courts of equity as a process for preventing wrong between and preserving the rights of parties in controversy before them."

<sup>18</sup> *Fanning v. Dunham*, 4 Johns. Ch., 35.

<sup>19</sup> *Chamberlain v. Sutherland*, 4 Bradw., 494.

<sup>20</sup> *Bank of U. S. v. Schultz*, 3 Ohio, 61. See also *Breeze v. Haley*, 11 Col., 351, 18 Pac., 551.

<sup>21</sup> *Lowry v. McGee*, 5 Yerg., 238.

<sup>22</sup> *Cummins v. Bennett*, 8 Paige, 79.

the court has dissolved an injunction granted on the original bill, and complainant then applies to another officer *ex parte*, upon a bill containing substantially the same grounds, no injunction will be allowed.<sup>23</sup> And where after dissolution a bill precisely similar to the first is filed by another party to obviate a difficulty arising in the former suit, it being apparent that the second bill is filed in the interest of the former complainant in whose behalf the relief is sought, an injunction will be refused.<sup>24</sup> So, after the refusal of a preliminary injunction, a second application for the relief will be denied when based upon the same bill, with an amendment alleging an additional fact which was well known to plaintiffs at the time of filing the original bill.<sup>25</sup>

§ 41. **Right to relief on amended bill.** While the right of the party complaining to amend his bill and renew the application, even after a dissolution upon the merits, may be regarded as clearly established by the authorities,<sup>26</sup> yet the exercise of the right is guarded with much caution, and it is only to be permitted under such peculiar circumstances as indicate that the promotion of justice requires it.<sup>27</sup> And where an injunction has been dissolved for want of equity in the bill, an *ex parte* injunction will not be granted upon an amended bill, or upon a new one supplying the equity of the old; but the court will require notice to the opposite party.<sup>28</sup> Where an injunction has already been granted and

<sup>23</sup> *Harrington v. American L. I. & T. Co.*, 1 Barb., 244.

<sup>24</sup> *Endicott v. Mathis*, 1 Stockt., 110.

<sup>25</sup> *Beckwith v. Blanchard*, 79 Ga., 303, 7 S. E., 224.

<sup>26</sup> *Buckley v. Corse*, Saxt., 504.

<sup>27</sup> *Calderwood v. Trent*, 9 Rob. (La.), 227.

<sup>28</sup> *Hornor v. Leeds*, 2 Stockt., 86. The reason for the rule is forcibly stated in this case by Williamson,

chancellor, as follows: "I lay down the rule that where an injunction has been dissolved for want of equity in the bill this court ought not to grant an *ex parte* injunction upon an amended bill, or upon a new bill supplying that equity. If a complainant is willing to swear to a case fitting the opinion of the court, the rights of a defendant should not be interfered with upon such a bill with-

is still in force, its repetition is derogatory to the authority of the court and will not be allowed.<sup>29</sup> And where the relief sought is purely preventive a court of equity will not continue or perpetuate an injunction after the cause for which it was granted has been removed and the rights of complainant are no longer in danger.<sup>30</sup> But, though the writ was improperly granted in the first instance, if it has been allowed to stand until final hearing, it is not error then to perpetuate it, sufficient equity appearing.<sup>31</sup>

§ 42. **When jurisdiction exercised by courts of last resort.** The granting of injunctions being an exercise of original and not of appellate jurisdiction, a court of last resort whose jurisdiction is limited by the state constitution will not be allowed to enlarge or extend its jurisdiction to the granting of injunctions in cases pending in the inferior courts where this power is not granted it by the constitution.<sup>32</sup> So if the constitution of a state limits the original jurisdiction of the

out affording the defendant an opportunity of being first heard."

<sup>29</sup> *Livingston v. Gibbons*, 4 Johns. Ch., 571.

<sup>30</sup> *Wiswell v. First Congregational Church*, 14 Ohio St., 31.

<sup>31</sup> *Clark v. Young*, 2 B. Mon., 57; *Smith v. Blake*, 96 Mich., 542, 55 N. W., 978.

<sup>32</sup> *Merrill v. Lake*, 16 Ohio, 373; *Kent v. Mehaffy*, 2 Ohio St., 498. In the latter case, Thurman, J., pronouncing the opinion of the court, says: "That we can allow an injunction in a case pending in this court upon an appeal is very clear. An injunction may be the very object of the suit—the final decree sought—and so a provisional injunction, during the pendency of the suit, may be necessary for the purposes of justice. The

power to allow these is a part of the appellate jurisdiction, the grant of which is authorized by the constitution, and has been made by the law. But to allow an injunction in a case pending in another court would be an exercise of original and not of appellate jurisdiction. Now the original jurisdiction conferred upon this court by the constitution is limited to *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*. Art. 4, sec. 2. . . . It would be wholly inconsistent with, and in a great measure destructive of, the judicial system it ordains, to suppose that this original jurisdiction can be enlarged by law. It is true there is no express prohibition against it, but none was necessary."

court of last resort of the state to certain specified cases, not including injunctions, and provides that in all other cases its jurisdiction shall be appellate only, it will not entertain an action for the granting of an injunction.<sup>33</sup> And the jurisdiction of the court being thus limited and defined by the constitution, original jurisdiction can not be conferred upon it over matters of injunction by an act of legislature.<sup>34</sup> Where, however, the power of granting injunctions is by the constitution of a state expressly conferred upon the supreme court of the state as a branch of its original jurisdiction, the disposition is to limit its exercise to cases *publici juris* and not to extend relief in cases of merely private right or affecting only private parties.<sup>35</sup> Consequently the writ will not be granted at the instance of a private individual but only upon an information filed by the attorney-general in the name and upon behalf of the state.<sup>36</sup> And it is not regarded as sufficient to set in motion such original jurisdiction that the matter is *publici juris*, but it should also be one which affects the sovereignty of the state, its franchises or prerogatives, and one in which the interest of the state is primary and not remote. And the restraining of local municipal taxation is not of such public importance in this sense as to set in motion the original jurisdiction of the court. But the obstruction of a navigable river within the limits of the state is a purpresture or public nuisance of such a nature, and so directly concerning the sovereign prerogative of the state and the

<sup>33</sup> *Campbell v. Campbell*, 22 Ill., 664; *Bryant v. The People*, 71 Ill., 32. *Cunningham*, 82 Wis., 39, 51 N. W., 1133; *State v. Cunningham*, 83 Wis., 90, 53 N. W., 35, 17 L. R. A., 145, 35 Am. St. Rep., 27; *State v. Morau*, 24 Mont., 433, 63 Pac., 390.

<sup>34</sup> *Campbell v. Campbell*, 22 Ill., 664. And see *Clark v. Borough of Washington*, 145 Pa. St., 566, 23 Atl., 333; *Bruce v. Pittsburg*, 161 Pa. St., 517, 29 Atl., 584.

<sup>35</sup> See *Attorney-General v. The Railroad Companies*, 35 Wis., 425; *Attorney-General v. City of Eau Claire*, 37 Wis., 400; *State v. Cunningham*, 81 Wis., 440, 51 N. W., 724, 15 L. R. A., 561; *State v. Anderson v. Gordon*, 9 N. Dak., 480, 83 N. W., 993, 52 L. R. A., 134.

prerogative jurisdiction of the supreme court of the state under the constitution, as to warrant the exercise of its original jurisdiction to enjoin such obstruction.<sup>37</sup> So the matter of the qualification of the members of a state legislature and the legality of their election involves questions of such public concern and so closely affects the sovereignty of the state as to warrant the supreme court in entertaining an original application for an injunction to restrain the secretary of state from publishing notices of an election of state senators under a reapportionment act upon the ground of the alleged unconstitutionality of the act.<sup>38</sup> And it is held under the constitution of Montana that the writ of injunction, as granted by the supreme court of that state, is a jurisdictional writ and not merely a writ to be issued in cases of which the court, upon other grounds, has original jurisdiction, and consequently, being the arm with which the court is equipped to deal with all judicial questions relating to the sovereignty of the state, its franchises or prerogatives, or the liberties of the people, it may be granted to enjoin acts which infringe political rights as distinguished from the purely property rights with which alone equity is concerned.<sup>39</sup> But a mere public nuisance as such, however, aggravated, which in no way effects the sovereignty, franchises or prerogatives of the state, affords no ground for an injunction from a court of last resort.<sup>40</sup>

§ 43. **Restrictions upon jurisdiction of the courts; prohibition; powers of United States district judge.** Where the cir-

<sup>37</sup> *Attorney-General v. City of Eau Claire*, 37 Wis., 400. See *State v. City of Eau Claire*, 40 Wis., 533. But whether the power of granting injunctions as thus conferred upon the supreme court of the state be considered as a branch of its original or as auxiliary to its appellate jurisdiction, it will not be exercised in a case still pending in a lower court. *Cooper v.*

*City of Mineral Point*, 34 Wis., 181.

<sup>38</sup> *State v. Cunningham*, 81 Wis., 440, 51 N. W., 724, 15 L. R. A., 561; *State v. Cunningham*, 83 Wis., 90, 53 N. W., 35, 17 L. R. A., 145, 35 Am. St. Rep., 27.

<sup>39</sup> *State v. Morau*, 24 Mont., 433, 63 Pac., 390.

<sup>40</sup> *In re Hartung*, 98 Wis., 140, 73 N. W., 988.



cuit courts of a state have under their organization no general chancery jurisdiction, their equity powers being special and limited and not including the power to grant injunctions, a statute conferring such power upon a circuit judge does not authorize the court as such to grant injunctions, a distinction being taken in that regard between the court and the judge.<sup>41</sup> So under a statute enacting that in all cases of breach of contract the plaintiff in an action at law may pray and have an injunction against a repetition or continuance of the breach of contract, the statute is construed not to confer general chancery powers upon the court of law, but only as extending to that court the remedy by injunction, without authorizing it to grant other equitable relief.<sup>42</sup> And if a court of equity in awarding an injunction proceeds without authority or jurisdiction, a writ of prohibition will lie to prevent further proceedings therein by such court.<sup>43</sup> But prohibition will not lie from a superior to an inferior court to prevent the latter from proceeding with certain injunction suits when it has undoubted jurisdiction over the subject-matter.<sup>44</sup> And it has been held that a district judge of the United States, while holding the circuit court, has power to grant an injunction as fully as the circuit judge or circuit justice might do; and that the prohibition of section 714 of the Revised Statutes of the United States, providing that an injunction shall not be issued by a district judge as one of the judges of the circuit court in any case where the party

<sup>41</sup> *Cummings v. Des Moines, W & S. W. R. Co.*, 36 Iowa, 173. Where all the regular judges empowered to hold a circuit court of the United States are absent, including the justice of the Supreme Court of the United States allotted to that circuit, another justice of the Supreme Court has jurisdiction to hear a motion for a prelim-

inary injunction and to grant the writ. *United States v. Louisville & P. C. Co.*, 4 Dill., 601.

<sup>42</sup> *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa, 422.

<sup>43</sup> *Swinburn v. Smith*, 15 West Va., 483.

<sup>44</sup> *State v. Judge of Superior District Court*, 29 La. An., 360.

has had reasonable time to apply to the circuit court for the writ, only limits the power of the district judge in vacation, and is not a limitation upon his power when sitting as a circuit judge.<sup>45</sup>

§ 44. **Supreme Court of Judicature Act in England.** Under the Supreme Court of Judicature Act of 1873, the power of granting injunctions under the English practice is much enlarged, being extended in terms to all cases in which it shall appear to the court to be just or convenient; and the court is empowered to grant the relief either unconditionally or upon such terms as shall seem just.<sup>46</sup> And under this statute it is held that the court has unlimited power to grant an injunction in any case in which it would be right and just to do so; but what is right or just must be determined, not by the caprice of the judge, but according to sufficient legal reasons and upon settled legal principles.<sup>47</sup>

<sup>45</sup> *Goodyear Dental Vulcanite Co. v. Folsom*, 3 Fed., 509.

<sup>46</sup> Supreme Court of Judicature Act, August 5, 1873. Subdivision 8 of section 25 enacts as follows: "A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditional or upon such terms and conditions as the court shall think just; and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession

under any claim of title or otherwise (or if out of possession) does or does not claim a right to do the act sought to be restrained under any color of title; and whether the estates claimed by both or by either of the parties are legal or equitable."

<sup>47</sup> *Beddow v. Beddow*, 9 Ch. D., 89. And in *Day v. Brownrigg*, 10 Ch. D., 294, Lord Justice James observes: "I think it is right to add that the power given to the court by sec. 25, sub-sec. 8, of the Judicature Act, 1873, to grant an injunction in all cases in which it shall appear to the court to be 'just and convenient' to do so, does not in the least alter the principles on which the court should act." And Lord Jessel, Master of the Rolls, says: "It must be just as well as convenient."

## CHAPTER II.

### OF INJUNCTIONS AGAINST ACTIONS AT LAW.

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#### I. GROUNDS OF THE JURISDICTION.

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§ 45. **Courts not enjoined, but only parties.** No branch of the jurisdiction of equity by injunction is so frequently invoked as that which pertains to the restraint of judicial proceedings, either before or after judgment. In the exercise of this jurisdiction courts of equity claim no supremacy over courts of law, since the injunction is in no sense a prohibition upon the action of the legal tribunal. The injunction is directed, not to the court, but to the litigant parties, and in no manner denies the jurisdiction of the legal tribunal.<sup>1</sup> It merely seeks to control the person to whom it is addressed, and to prevent him from using the process of courts of law where it would be against conscience to allow him to proceed. It is granted on the ground that an unfair use is

<sup>1</sup> *Burke v. Ellis*, 105 Tenn., 702, 58 S. W., 855.

being made of the legal forum, which, from circumstances of which equity alone can take cognizance, should be restrained lest an injury be committed wholly remediless at law.<sup>2</sup> And the power of courts of equity to restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to a person from the doubtful title of another, is regarded as one of the legitimate functions of equity.<sup>3</sup>

§ 46. **Judge not enjoined; judgment not void because of injunction.** As already indicated the jurisdiction of equity in restraint of actions at law is exercised, not over the courts of law, but only upon the parties litigant therein. And a court of equity is devoid of jurisdiction to grant an injunction against the judge of another court to restrain him from acting in or making orders in a particular cause. Every judge is supreme and independent in his own sphere, and can not be restrained in the discharge of his functions by the process of injunction. While, therefore, equity may in proper cases enjoin suitors in another court from proceeding with their cause, the injunction can not operate upon or run against the judge of such court.<sup>4</sup> And since the injunction is not operative upon the court, but only upon the party litigant to whom it is directed, if the court in which the action enjoined is pending has jurisdiction of the subject and of the parties, its judgment will not be held void because of an injunction restraining the prosecution of the

<sup>2</sup> 2 Story's Eq., § 875; *Hill v. Turner*, 1 Atk., 516; *Tyler v. Hamersley*, 44 Conn., 419. In *Williams v. Sadler*, 4 Jones Eq., 378, it is held that the ordinary and usual course is to allow proceedings as far as judgment, and to interfere only for the purpose of enjoining the execution. I am not aware of any other authority holding this

doctrine; and it may be regarded as the well settled practice of courts of equity to interfere, on proper cause shown, at any stage of the proceedings, without waiting for judgment to be had.

<sup>3</sup> *Henwood v. Jarvis*, 12 C. E. Green, 247.

<sup>4</sup> *Sanders v. Metcalf*, 1 Tenn. Ch., 419.



cause.<sup>5</sup> Thus, in New York, where law and equity jurisdiction are both administered by one and the same tribunal, it is held that a judge holding a law court is not divested of his jurisdiction to proceed with actions pending therein because another judge of the same court has, in the exercise of his equity powers, enjoined the proceedings at law.<sup>6</sup>

§ 47. **General rule; fraud, accident and mistake; illustrations.** In general it may be said that where through fraud, accident or mistake such an advantage will be gained in a suit at law as will render it an instrument of great injustice, and it is against conscience to allow the suit to proceed, equity will interfere by injunction.<sup>7</sup> Thus, a suit on an indemnity bond has been enjoined where it had been given through mistake, the obligor supposing he was signing a recognizance.<sup>8</sup> And where the contract on which a suit is brought was entered into on mistaken and false representations, the proceedings may be enjoined.<sup>9</sup> So a suit upon promissory notes is properly enjoined where it appears that the notes were given in exchange for an interest in certain other notes which had been obtained through fraudulent representations in a sale of patent-rights.<sup>10</sup> And where fraud is relied upon as the ground for relief, it is not necessary that the facts should be proved precisely as alleged, but it will be sufficient if they are proved in substance.<sup>11</sup> So undue influence exercised upon the maker of a note, who was a person of weak intellect and constantly given to intoxication, has been deemed sufficient ground for restraining a suit upon the note.<sup>12</sup> But fraudulent representations made by the payee to the maker

<sup>5</sup> *Platt v. Woodruff*, 61 N. Y., 378.

<sup>6</sup> *Id.*

<sup>7</sup> 2 Story's Eq., § 885; *Sackett v. Hillhouse*, 5 Day, 551; *Dale v. Roosevelt*, 5 Johns. Ch., 174; *Field v. Cory*, 3 Halst. Ch., 574.

<sup>8</sup> *Field v. Cory*, 3 Halst. Ch., 574.

<sup>9</sup> *Dale v. Roosevelt*, 5 Johns. Ch., 174.

<sup>10</sup> *Sackett v. Hillhouse*, 5 Day, 551.

<sup>11</sup> *Id.*

<sup>12</sup> *Rembert v. Brown*, 17 Ala., 667.

of a promissory note will not warrant an injunction against a suit by a *bona fide* holder of the note for valuable consideration.<sup>13</sup> Nor will the prosecution of a writ of error to a judgment be enjoined because of mistakes in the bill of exceptions, no fraud being shown.<sup>14</sup> The injunction will be dissolved where the answer fully disproves the allegations of fraud, and shows a *bona fide* debt and full consideration, it not appearing that the suits, though several in number, were vexatious or malicious.<sup>15</sup> And to warrant the interference, a clearly established case of fraud, accident or mistake must be shown, sufficient to deprive the person aggrieved of a defense at law.<sup>16</sup> The loss of one conveyance in a chain of title is sufficient to warrant equity in enjoining proceedings at law to get possession of the premises, as well on the ground of accident whereby a defense can not be perfectly made at law, as from the necessity of preventing a cloud upon title.<sup>17</sup>

<sup>13</sup> Dougherty v. Scudder, 2 C. E. Green, 248.

<sup>14</sup> Ford v. Weir, 24 Miss., 563.

<sup>15</sup> Jackson v. Darcy, Saxt., 194.

<sup>16</sup> Rogers v. Cross, 3 Chand., 34.

<sup>17</sup> Butch v. Lash, 4 Iowa, 215.

But see, *contra*, Rogers v. Cross, 3 Chand., 34. Butch v. Lash illustrates very clearly some of the grounds upon which equity will interpose to stay proceedings at law. Complainant in the injunction suit being sued at law for the recovery of certain real estate, and his chain of title being defective, one deed therein having been lost before recorded, the court below decreed a perpetual injunction against the proceedings at law. The decree was affirmed by the appellate court, Wright, C. J., saying: "The respondent's action was brought to test the legal title

to this property, and in the legal forum he was entitled to succeed, if his title, in this respect, was superior to that of complainant. Owing to the loss and failure to record the deed to Linder, complainant was unable to show a complete chain by the title papers or record; and, under such circumstances, we think he was fully justified in asking equitable aid to ascertain the existence of such deed. We can not say that his defense would have been adequate and complete at law. But a further and conclusive consideration in favor of the bill is that complainant asked equitable interposition on the ground of accident, and to remove a cloud upon his title. To relieve against an injury resulting from accident is a very ancient branch of equitable juris-

§ 48. **Litigation confined to original forum.** The propriety of confining litigation to the forum in which it is first commenced has repeatedly been recognized by courts of equity, and an injunction will generally be allowed to prevent either party from removing the litigation into another court.<sup>18</sup> Especially will the jurisdiction be exercised to restrain one from the removal of his cause after an adverse decision in the court to which he had first resorted.<sup>19</sup> Nor is the application of the rule affected by the fact that the court subsequently acquiring jurisdiction of the subject-matter, and in which the proceedings are sought to be enjoined, has equity as well as common law powers.<sup>20</sup> In all such cases the parties will be left to contest their rights in the original forum, since any other rule would necessarily lead to great abuse and render chancery an instrument of great injustice.<sup>21</sup>

§ 49. **Illustrations of the rule.** Illustrations of the rule as above stated are frequent, but they are all based upon the propriety, and indeed the necessity, of confining litigation to the tribunal in which it is first instituted. And where the subject-matter of a litigation is already pending in equity, and it has full and complete jurisdiction and ample power to afford relief, it will not permit the litigation to be transferred to another forum, and will by injunction prevent a party to the cause from afterward proceeding in an action

diction. . . . The loss of the deed is expressly shown by the complainant's sworn bill; there is no pretense that it occurred from any negligence or misconduct on his part. The respondent had procured a conveyance from the county, which was a cloud upon complainant's title; and to avoid the effect of this loss, and remove this cloud, he might reasonably and properly ask relief at the hands of the chancellor."

<sup>18</sup> *Conover v. Mayor*, 25 Barb., 531; *Crane v. Bunnell*, 10 Paige, 333. See also *Horn v. Kilkenny R. Co.*, 1 Kay & J., 399; *Hadfield v. Bartlett*, 66 Wis., 634; 29 N. W., 639.

<sup>19</sup> *Conover v. Mayor*, 25 Barb., 531.

<sup>20</sup> *Id.*

<sup>21</sup> *Crane v. Bunnell*, 10 Paige, 333.

at law concerning the same subject-matter. Thus, pending a bill in equity to enforce specific performance of a contract to convey lands, the court may enjoin the defendant in that action from suing at law to recover damages for a breach of the same contract.<sup>22</sup> So where proceedings in equity have gone so far as to reach a decree for an accounting, the court will enjoin the plaintiff in that action from proceeding at law touching the same matter.<sup>23</sup> So creditors of a railway company, who have taken proceedings against it in a state court to enforce a statutory lien for labor performed in the construction of the road, having invoked the jurisdiction of that court and submitted their rights to its decision, may be enjoined from instituting proceedings in bankruptcy against the company, to the great prejudice and damage of other creditors, when they may have full and complete justice in the original suit.<sup>24</sup> And it is to be observed that, in cases of this nature, the court of equity having already jurisdiction of the subject-matter and of the parties to the cause, it is not necessary that a new action should be begun for the purpose of obtaining the preventive relief which is sought. And where, after instituting his action in equity, complainant sues at law concerning the same matter, he may be enjoined from proceeding at law merely upon motion of defendant in the original suit.<sup>25</sup> But the fact that a bill in equity is pending in another state concerning the same subject-matter affords no ground for enjoining a suit at law, even though the parties to the action at law are also parties to the suit in equity in the foreign state.<sup>26</sup>

§ 50. **Equity will not interfere with court first acquiring jurisdiction; illustrations.** While courts of equity, as is thus

<sup>22</sup> *Blakeney v. Hardie*, 1 R. 7 Eq., 472.

<sup>25</sup> *Wilson v. Wetherherd*, 2 Meriv., 406.

<sup>23</sup> *Mocher v. Reed*, 1 Ball & B., 318.

<sup>26</sup> *Insurance Company v. Brune's Assignee*, 6 Otto, 588.

<sup>24</sup> *Pusey v. Bradley*, 1 Thomp. & C., 661.

shown, are averse to permitting their jurisdiction, when it has once attached, to be usurped by other tribunals, they will not, upon the other hand, interfere with proceedings in other courts of competent jurisdiction which have first acquired control over the subject-matter and the controversy, or with the proceedings of courts of special and peculiar jurisdiction created for particular purposes or with special and peculiar powers.<sup>27</sup> And where the jurisdiction of courts of law and equity is concurrent over the subject in controversy, and the court of law has first acquired jurisdiction by an action brought in that forum, equity will refuse to enjoin the action at law when there is no obstacle to obtaining complete relief in that proceeding.<sup>28</sup> So where an application is properly pending in a probate court for a new trial in a proceeding for the probate of a will which has been refused by the court, equity will not entertain a bill to enjoin the parties from further litigating in the probate court, but will leave that tribunal to proceed with and determine the application for a new trial.<sup>29</sup> And where a question as to the disposition of lands of an intestate is pending in the proper court of probate, which has full jurisdiction in the premises, and from whose orders the right of appeal exists, equity will not enjoin one claiming a share in the estate from asserting his rights in that proceeding, but will leave the question to be determined by the probate court.<sup>30</sup> Nor will a court of equity interfere by injunction with the action of a court-martial, which is invested by the laws of the state with jurisdiction

<sup>27</sup> *Johnston v. Young*, 1 R. 10 Eq., 403; *Kinney v. Redden*, 2 Del. Ch., 44; *Morgan v. Morgan's Adm'r*, 50 Ala., 89; *Perault v. Rand*, 10 Hun, 222.

<sup>28</sup> *Johnston v. Young*, 1 R. 10 Eq., 403.

<sup>29</sup> *Morgan v. Morgan's Adm'r*, 50 Ala., 89. But the English Court of Chancery, upon a bill by an ex-

ecutor in trust, would enjoin a suit in the ecclesiastical court for a legacy, notwithstanding the original jurisdiction of that court in legacies, the relief being allowed upon the ground that trusts were properly cognizable only in equity.

*Anon.*, 1 Atk., 491.

<sup>30</sup> *Kinney v. Redden*, 2 Del. Ch., 44.



over military offenses, since the orderly administration of the law requires that the person against whom proceedings are instituted should assert his defense in the tribunal having jurisdiction over the matters in controversy.<sup>31</sup> But an injunction has been granted to stay proceedings in a court of admiralty upon the ground of newly discovered evidence, discovered at a stage of the proceedings when, by the rules of the admiralty court, no new evidence could be received.<sup>32</sup>

§ 51. **Further illustrations.** Upon principles similar to those which have been above discussed and illustrated it is held that where the rights of complainant, upon which he bases his application for an injunction, are already pending in another court having full jurisdiction of the matter involved, and that litigation has proceeded so far that the parties to the controversy have been heard and only await an adjudication, a court of equity will not assume jurisdiction or grant an interlocutory injunction, but will leave complainant to his remedy in the action already pending.<sup>33</sup> And equity will not interfere by injunction to restrain the taking out of letters of administration in the probate court when the controversy concerning the administration of the estate can be properly determined there, and when the court of equity itself has no power to grant administration.<sup>34</sup> And the English Court of Chancery, at an early day, refused an injunction upon a bill to set aside a will of personal estate for fraud upon the ground that the spiritual court had jurisdiction of the controversy.<sup>35</sup>

§ 52. **Proceedings in court of equity not enjoined.** It is also a well established rule pertaining to that branch of the jurisdiction of equity under discussion, that an injunction will

<sup>31</sup> *Perault v. Rand*, 10 Hun, 222.

<sup>34</sup> *Wilcocks v. Carter*, L. R. 10

<sup>32</sup> *Jarvis v. Chandler*, Turn. & Ch., 440.  
R., 319.

<sup>35</sup> *Stephenton v. Gardiner*, 2 P.

<sup>33</sup> *New Jersey Z. Co. v. Franklin Iron Co.*, 29 N. J. Eq., 422.

Wms., 286. As to the circumstances under which a court of

not be granted to stay proceedings in the same court of equity, either upon the application of parties to the proceedings sought to be enjoined, or of strangers to such proceedings, since a departure from the rule would lead to interminable litigation.<sup>36</sup> A court of equity will not, therefore, enjoin the prosecution of another bill in equity, or stay proceedings in another equitable action in the same court, when no reason is shown why the party aggrieved can not protect himself by interposing his defense in the former suit, since the defendant in the original suit can ordinarily avail himself of all his equities and defenses with full effect in that action.<sup>37</sup>

§ 53. **Exception to rule in actions of interpleader.** While, as is thus shown, a court of equity will not ordinarily interfere by injunction with proceedings in another cause in equity, an exception to the rule is recognized in actions of interpleader, growing out of the peculiar nature of such actions and the necessity of drawing the entire litigation into the one principal action. And where in a bill of interpleader one of the defendants is suing plaintiff in equity, and another is proceeding against him in an action at law, it is proper to enjoin the proceedings both in equity and at law.<sup>38</sup> And when an interlocutory injunction is obtained in an action of

equity may enjoin proceedings in a surrogate's court, under the New York practice, in behalf of an administrator, see *Wright v. Fleming*, 76 N. Y., 517.

<sup>36</sup> *Smith v. American Co.*, 1 Clarke Ch., 307; *Lane v. Clark*, Ib., 310; *Redd v. Blandford*, 54 Ga., 123; *Dayton v. Relf*, 34 Wis., 86. And see *Schell v. Erie R. Co.*, 51 Barb., 368; *Erie R. Co. v. Ramsey*, 57 Barb., 449; *Jackson v. Leaf*, 1 Jac. & W., 229, and notes.

<sup>37</sup> *Redd v. Blandford*, 54 Ga., 123; *Dayton v. Relf*, 34 Wis., 86. But

it is held in Minnesota that an injunction may be granted in one equitable action to restrain proceedings in another equitable action pending in the same court, when the party aggrieved can not have full and adequate relief by intervening in the original suit. *Mann v. Flower*, 26 Minn., 479; 5 N. W., 365.

<sup>38</sup> *Crawford v. Fisher*, 10 Sim., 479; *Prudential Assurance Co. v. Thomas*, L. R. 3 Ch. App., 74; *Warrington v. Wheatstone*, Jac., 202.

interpleader to restrain further proceedings at law, and there appears to be a serious question to be determined upon the hearing, it is proper to continue the injunction until the final hearing.<sup>39</sup>

§ 54. **When actions at law growing out of proceedings in equity enjoined.** Courts of equity are disinclined to permit their proceedings to be called in question by courts of law, and it has been held, where actions at law were brought by one complaining of the execution of process from the court of chancery, that an injunction might properly issue to restrain the prosecution of the actions at law.<sup>40</sup> Where, however, an action at law for damages for false imprisonment is brought for having irregularly issued an attachment in a chancery proceeding, equity will not restrain the parties from proceeding at law, although they are subject to the jurisdiction of the court, if serious and substantial injury has been sustained.<sup>41</sup>

§ 55. **When new suit in equity unnecessary.** In the exercise of its jurisdiction to restrain proceedings at law a court of equity usually requires that a bill should be filed, or an independent suit instituted for the purpose of obtaining relief by injunction. This course is, however, unnecessary when a suit in equity is already pending in which the necessary relief may be had. And where a bill for an injunction against an action at law discloses the pendency of a prior suit in equity pertaining to the same subject-matter, and in which the relief sought by injunction in the new suit might have been obtained by motion or petition in the cause, an injunction granted in the second cause will be regarded as improvidently allowed, and will be accordingly dissolved.<sup>42</sup>

<sup>39</sup> *Cochrane v. O'Brien*, 6 Ir. Eq., 312.

<sup>41</sup> *McKinnon v. Palmer*, 7 Ir. Eq., 496.

<sup>40</sup> *Walker v. Micklethwait*, 1 Drew. & Sm., 49.

<sup>42</sup> *Washington v. Emery*, 4 Jones Eq., 29.

§ 56. **Requisites of bill.** The bill should show the precise state of the pleadings in the suit which it is sought to enjoin, as well as the court in which the suit is pending, to enable the officer granting the injunction to judge of its propriety and to fix the terms upon which the relief will be allowed.<sup>43</sup> And if, in addition to the prayer for injunction, the bill prays for a discovery of matters material to the defense of the suit at law, the nature of the defense at law must clearly appear in the bill before equity will enjoin the suit.<sup>44</sup> So, also, in addition to the nature of the suit and the court in which it is pending, the bill should show the date when it was begun, the various steps taken in the cause, and especially the defenses made, if any, and all the facts necessary to show that injustice would be done complainant, or that he would be deprived of some legal or equitable right, if his adversary were permitted to proceed to judgment at law.<sup>45</sup>

§ 57. **Parties; officers of court of equity.** As regards the parties for and against whom the jurisdiction will be exercised, it is to be remarked that an injunction will not be granted in aid of a suit against one not a party to the suit.<sup>46</sup> Nor will the relief be allowed in behalf of one not a party to the suit sought to be enjoined.<sup>47</sup> But the jurisdiction of chancery to restrain suits at law against its officers acting under its direction is old and well established, and will be exercised even though the parties by whom the proceedings at law are instituted are not parties to the suit in chancery.<sup>48</sup> And where one has instituted a suit in the name of another,

<sup>43</sup> *Carroll v. Farmers & M. Bank, Harring. (Mich.), 197;*

*Chadwell v. Jordan, 2 Tenn. Ch., 635.*

<sup>44</sup> *McIntire v. Mancius, 3 Johns. Ch., 45.*

<sup>45</sup> *Chadwell v. Jordan, 2 Tenn. Ch., 635.*

<sup>46</sup> *Chamblin v. Slichter, 12 Minn., 276.*

<sup>47</sup> *New York v. Connecticut, 4 Dall., 1.*

<sup>48</sup> *Bailey v. Devereux, 1 Vern., 269; Frowd v. Lawrence, 1 Jac. & W., 655; Ex parte Clarke, 1 Russ. & M., 563.*

but without his consent and without authority, either legal or equitable, the proceedings may be enjoined.<sup>49</sup>

§ 58. **When application made in suit pending.** Where it is sought to stay or enjoin proceedings in equity by one who is a party or privy to the proceedings, the application should be made directly to the court itself in the action pending, and an officer outside of court has no authority to enjoin such proceedings.<sup>50</sup>

§ 59. **Rule as to confessing judgment at law.** It has been frequently held that one who comes into equity for relief against proceedings at law, and who seeks to enjoin such proceedings, will be granted relief only upon condition of his first confessing judgment at law.<sup>51</sup> The principle upon which the rule is based is said to be that whenever a person resorts to equity for substantive relief against a claim asserted at law he must submit himself entirely and without reserve to the jurisdiction of the chancellor.<sup>52</sup> The rule, however, if rule it may be called, is by no means inflexible; and where one has a distinct ground of equitable relief aside from his defense at law, he is not obliged to abandon his legal defense by confessing judgment before proceeding in equity to enjoin the suit at law.<sup>53</sup> But where complainant in his bill expressly offers to withdraw his defense at law and submit to judgment, for the reason that his relief is alone in equity, he is entitled to an injunction.<sup>54</sup>

§ 60. **Limitations upon the rule.** The better doctrine undoubtedly is that the question of requiring a defendant at law, who seeks upon equitable grounds to enjoin the action

<sup>49</sup> *Ex parte Merrit*, 5 Paige, 125. *dan*, 2 Tenn. Ch., 635; *Haynes v.*

<sup>50</sup> *Dyckman v. Kernochan*, 2 Bank, 106 Tenn., 425, 61 S. W., Paige, 26; *Ellsworth v. Cook*, 8 775.

Paige, 643. <sup>52</sup> *Warwick v. Norvell*, 1 Leigh.

<sup>51</sup> *Warwick v. Norvell*, 1 Leigh, 96.

96; *Mathews v. Douglass*, Cooke <sup>53</sup> *Warwick v. Norvell*, 1 Rob.

(Tenn.), 136; *Conway v. Ellison*, (Va.), 308; *Dudley v. Miner's*

14 Ark., 360; *Nelson v. Owen*, 3 Ex'rs, 93 Va., 408, 25 S. E., 100.

*Ired. Eq.*, 175; *Chadwell v. Jor-* <sup>54</sup> *Hodges, Ex parte*, 24 Ark., 197.



against him, first to confess judgment at law as a condition to relief in equity, rests in the discretion of the court, to be exercised according to the circumstances of the case upon well defined principles of equity and law. The object to be attained in such cases is to preserve the rights of the person enjoined, and at the same time to inflict no wrong upon him who seeks relief in equity. The court should not require the defendant at law to confess judgment if such course would manifestly endanger his rights, or when his bill wholly denies the right of the plaintiff at law to recover. And if the injunction is granted upon such terms, the confession should be required only upon terms of the judgment being afterward dealt with as the court of equity may direct.<sup>55</sup> Where, therefore, defendant at law has been allowed an injunction against the action upon condition of his confessing judgment therein, and the injunction is afterward dissolved for want of equity, plaintiffs in the action at law should be required to withdraw the judgment which they have thus obtained, in order that the cause may be tried at law upon its merits.<sup>56</sup> But where, after the confession of judgment by the defendant in the suit at law, his bill is dismissed for want of equity and he thereupon moves to set aside the confession, it is incumbent upon him, in order to sustain such motion, to show clearly a good legal defense to the action; otherwise the motion should be denied.<sup>57</sup> And upon a bill by plaintiff in an action at law to enjoin defendant in that action from making defense thereto, it is improper to grant such injunction and yet to allow plaintiff to proceed with his action at law.<sup>58</sup>

<sup>55</sup> *Great Falls Manufacturing Co. v. Henry's Adm'r*, 25 Grat., 575; *Thornton v. Thornton*, 31 Grat., 212; *Hooper v. Cooke*, 25 L. J. Ch., 467; *S. C.*, 2 Jur. N. S., 527.  
<sup>56</sup> *Robinson v. Braidon*, 44 West Va., 183, 28 S. E., 798.  
<sup>57</sup> *Jones v. Ramsey*, 3 Bradw., 303.  
<sup>58</sup> *Great Falls Manufacturing Co. v. Norvell*, 1 Leigh, 96.

<sup>56</sup> *Great Falls Manufacturing Co.*

§ 61. **Bill of peace.** Equity will interfere to restrain proceedings at law upon a bill in the nature of a bill of peace, whose object is to restrain useless and vexatious litigation and to prevent a multiplicity of suits.<sup>59</sup> But a bill of peace will usually be entertained only in two classes of cases: first, where complainant has already sufficiently established his right at law;<sup>60</sup> and second, where the persons controverting the right are so numerous as to render the injunction necessary for the prevention of a multiplicity of suits.<sup>61</sup> And where the suit is between two persons, and but one trial at law has been had, the relief will not be granted.<sup>62</sup> But two verdicts upon the merits in favor of complainant, one of them being upheld and affirmed, will suffice to warrant the court in entertaining a bill of peace, other suits having been brought and dismissed.<sup>63</sup> And where the right has been satisfactorily established at law, it is held to be quite immaterial what number of trials have

<sup>59</sup> Dedman *v.* Chiles, 3 Monr., 426; Woods *v.* Monroe, 17 Mich., 238; Coville *v.* Gilman, 13 West Va., 314. And see Morse *v.* Morse, 44 Vt., 84; Allen *v.* Donnelly, 5 Ir. Ch., 229; Bishop *v.* Rosenbaum, 58 Miss., 84.

<sup>60</sup> Eldridge *v.* Hill, 2 Johns. Ch., 281; West *v.* Mayor, etc., 10 Paige, 539; Dedman *v.* Chiles, 3 Monr., 426; Lapeer Co. *v.* Hart, Harring. (Mich), 157; Paterson & H. R. R. Co. *v.* Jersey City, 1 Stockt., 434; Poyer *v.* Village of Des Plaines, 123 Ill., 111; Chicago, B. & Q. R. Co. *v.* Ottawa, 148 Ill., 397, 36 N. E., 85. And an injunction has been granted in a bill in the nature of a bill of peace to restrain the bringing of repeated actions at law pending an appeal by complainant from a judgment rendered against him in an unsuccessful

attempt in one of the suits to establish his right at law, such judgment being *res adjudicata* and therefore estopping him from raising his defense in the subsequent actions. Norfolk & N. B. H. Co. *v.* Arnold, 143 N. Y., 265, 38 N. E., 271.

<sup>61</sup> Eldridge *v.* Hill, 2 Johns. Ch., 281; West *v.* Mayor, etc., 10 Paige, 539; Bath *v.* Sherwin, 1 Prec. Ch., 261; Ewelme Hospital *v.* Andover, 1 Vern., 266; Trustees, etc. *v.* Nicoll, 3 Johns., 566; Tenham *v.* Herbert, 2 Atk., 483; Poyer *v.* Village of Des Plaines, 123 Ill., 111; Chicago, B. & Q. R. Co. *v.* Ottawa, 148 Ill., 397, 36 N. E., 85.

<sup>62</sup> Eldridge *v.* Hill, 2 Johns. Ch., 281.

<sup>63</sup> Dedman *v.* Chiles, 3 Monr., 426.

taken place, whether two only or more.<sup>64</sup> But the rule requiring the right to be first established at law has no application where, from the nature of the case, the plaintiff can have no opportunity so to establish it. Thus, where the plaintiff is in possession of real property with respect to which the defendant, under claim of title, is bringing repeated actions of trespass in which the question of title can not be adjudicated, the plaintiff may invoke the aid of equity to prevent a multiplicity of suits in the first instance since there is no form of action of a legal nature in which he can first establish his right.<sup>65</sup> Where there is one general right common to a number of persons, one person claiming or defending the right against many, or many against one, equity will interfere and determine the right in order to prevent vexatious litigation and multiplicity of suits.<sup>66</sup> Thus, where one is in possession of land, with complete legal title, though not all appearing of record, he may enjoin a number of ejectment suits brought by others against him as to a portion of the premises, since the question is the same as to all of the premises, and may be determined by the chancery proceeding, and thus avoid a multiplicity of suits.<sup>67</sup> So where numerous individuals have commenced separate actions at law against a railway company to recover a penalty created by statute for a refusal to grant stop-over privileges, the same general right being asserted upon the one side and denied upon the other in all the suits, equitable relief is properly granted against the prosecution of the actions at law in order to avoid the hardship and oppression thus resulting from a multiplicity of suits.<sup>68</sup> And where there are numerous conflicting claims

<sup>64</sup> *Paterson & H. R. R. Co. v. Jersey City*, 1 Stockt., 434. *inson*, 132 Cal., 408, 64 Pac., 572; *National Park Bank v. Goddard*.

<sup>65</sup> *Langdon v. Templeton*, 61 Vt., 119, 17 Atl., 839. *131 N. Y.*, 494, 30 N. E., 566.

<sup>67</sup> *Woods v. Monroe*, 17 Mich.,

<sup>66</sup> *Tenham v. Herbert*, 2 Atk., 238.

<sup>68</sup> *483; Woods v. Monroe*, 17 Mich., *Southern Pacific Co. v. Rob-*  
*238; Southern Pacific Co. v. Rob-* *inson*, 132 Cal., 408, 64 Pac., 572.

to the same property which a court of law could not settle or adjudicate without working great injustice, all such claims being founded upon a single, continuous, fraudulent scheme which inflicts a similar injury to all, differing only in degree, equity may interfere by injunction and take jurisdiction of the entire controversy in a suit brought by one claimant to the property in dispute to enjoin the prosecution of numerous separate actions of replevin brought by various other claimants.<sup>69</sup>

§ 62. **Distinction between bill of peace and action to consolidate.** A distinction, however, is to be taken between a bill of peace, proper, of which equity will entertain jurisdiction, and one whose object is merely to procure a consolidation of the suits, which can be attained as well at law as in equity. Thus, where an injunction was asked to restrain proceedings in ninety-two suits in ejectment, the parties, pleadings, title and testimony being the same in all the cases, until one or more could be tried, since the object of the bill was merely to obtain a consolidation of the suits, and a court of law was equally competent to give the relief an injunction was refused.<sup>70</sup> And an injunction is properly dissolved which staid proceedings in sixty-seven suits on county orders brought in one day against the county commissioners, since the defense was at law and should be made there.<sup>71</sup> Nor will a bill of peace ordinarily be entertained where the right in question is litigated between only two persons, and the decree of a court of equity would affect no others.<sup>72</sup>

§ 63. **Multiplicity of suits enjoined.** Where, however, a large number of suits are pending between the same parties

<sup>69</sup> *National Park Bank v. Goddard*, 131 N. Y., 494, 30 N. E., 566.

<sup>71</sup> *Lapeer Co. v. Hart, Harring.* (Mich.), 157.

<sup>70</sup> *Peters v. Prevost*, 1 Paine's C. C., 64. Whether in such case the injunction would be allowed against the remaining suits after several verdicts, *quære*.

<sup>72</sup> *Eldridge v. Hill*, 2 Johns. Ch., 281; *Tenham v. Herbert*, 2 Atk., 483; *Cowper v. Clerk*, 3 P. Wms., 157; *Kinkaid v. Hiatt*, 24 Neb., 562, 39 N. W., 600.

and concerning the same subject-matter, and the court in which they are pending has no power to order a consolidation of the actions, a bill for an injunction will lie to prevent the hardship and oppression of a multiplicity of suits. Thus, where seventy-seven actions had been begun against a street railway company in a justice court by the municipal authorities of a city to recover separate penalties for the running of cars without a license, the question to be determined being the same in all the suits, it was regarded as an appropriate case to enjoin all the suits but one, additional ground for the relief being found in the fact that the justice court was powerless to relieve by consolidating the actions.<sup>73</sup> And the bringing of repeated suits weekly for the recovery of wages claimed to be due to an employee weekly, under a contract for labor, has been held sufficient to warrant an injunction to prevent a multiplicity of suits.<sup>74</sup> So upon a bill to enjoin the collection of a promissory note already in suit, and to restrain defendant from transferring other notes of the same character not yet due, an injunction is proper for the purpose of preventing a multiplicity of suits upon the several notes, and in order that the whole matter may be determined upon the proceeding in equity.<sup>75</sup> So equity may enjoin the bringing of successive and repeated actions at law for the recovery of installments of royalty claimed to be due until a final determination of an appeal from a judgment rendered against complainant in an action brought for the recovery of one of the installments, where the same defense is relied upon in each suit and complainant is estopped by the judgment in the first suit from maintaining that defense in the subsequent actions. But the relief in such a case should be granted only upon such terms as will adequately protect the defendant in

<sup>73</sup> Third Avenue R. Co. v. Mayor of N. Y., 54 N. Y., 159. See also Galveston, H. & S. A. R. Co. v. Dowe, 70 Tex., 5, 7 S. W., 368. <sup>74</sup> Tarbox v. Hartenstein, 4 Baxter, 78. <sup>75</sup> Zeigler v. Beasley, 44 Ga., 56.



case the appeal should finally be decided adversely to the complainant.<sup>76</sup> And where the plaintiff had guaranteed the principal and interest of several hundred bonds which were in the hands of numerous holders and it was claimed that the guarantee was not binding for reasons which were applicable to all of the bonds alike, it was held that the plaintiff was entitled to the interposition of equity by injunction to prevent the hardship which would result from being compelled to raise such common defense in a multitude of separate actions at law brought by the several holders of the bonds.<sup>77</sup>

§ 63 *a*. **The same.** Indeed, the courts have gone so far in their endeavor to prevent useless and vexatious litigation as to hold in cases where numerous separate actions at law are about to be commenced by a single individual against each of a large number of persons, all involving the decision of the same questions of law and fact, that such parties may unite in a bill to enjoin the commencement and prosecution of such suits notwithstanding the fact that each of the complaining parties will be subjected to the defense of but a single legal action. In other words, the court entertains jurisdiction for the purpose of preventing a multiplicity of suits although the person who will be subjected to the burden of a multiplicity of suits is making no complaint. Thus, where a city was about to commence separate actions at law against each of a large number of individuals for the recovery of a penalty imposed for failure to comply with the terms of an alleged illegal ordinance, it was held that they could unite in a single bill in equity to enjoin the prosecution of such actions, notwithstanding that each of the complainants could have set up the invalidity of the ordinance as a defense to the prosecution against him and would thus have been burdened with the defense of but a single action.<sup>78</sup> So where a single plaintiff

<sup>76</sup> *Norfolk & N. B. H. Co. v. Ar-* *v. Ohio V. I. & C. Co.*, 57 Fed., 42. nold, 143 N. Y., 265, 38 N. E., 271. <sup>78</sup> *City of Chicago v. Collins*, 175

<sup>77</sup> *Louisville, N. A. & C. Ry. Co. Ill.*, 445, 51 N. E., 907, 49 L. R. A.,

was about to commence separate actions of ejectment against each of several defendants, in all of which the issues would depend upon the same questions of law and upon an identical state of facts, the injunction was granted restraining the prosecution of the ejectment suits pending a hearing of the entire controversy in equity.<sup>79</sup> So where the owner of a building which had been destroyed by fire had commenced separate actions at law against each of several insurance companies to recover the insurance, the policies being all alike and the same defense being interposed in each case, it was held the companies could enjoin the prosecution of the actions at law and have the controversy determined in equity.<sup>80</sup> The contrary and unquestionably the better view has been adopted by other courts which hold that where the complainant or each of a number of co-complainants will be subjected to the defense of but a single action at law, no case is presented for the interposition of equity to prevent a multiplicity of suits. These courts apply the fundamental rule forbidding interference by injunction where the legal remedy is adequate and the mere fact that other persons may likewise be compelled each to defend a suit involving substantially the same questions of law and fact creates no such equity upon the part of the defendants as will justify the exercise in their behalf of the restraining power of the court and the deter-

408, 67 Am. St. Rep., 224; *Wilkie v. City of Chicago*, 188 Ill., 444, 58 N. E., 1004, 80 Am. St. Rep., 182. If the city were harassing a single defendant with useless and repeated prosecutions notwithstanding the illegality of the ordinance, such defendant, having first established his right in one of the actions, might be entitled to relief by a bill of peace. And if the city were about to commence separate prosecutions against each of a

large number of individuals, where the validity of the ordinance could be as well determined in a single one, thereby subjecting itself to useless and unnecessary costs, a tax payer might possibly maintain a bill to restrain the misapplication of public funds.

<sup>79</sup> *Osborne v. Wisconsin Central R. Co.*, 43 Fed., 824.

<sup>80</sup> *Tisdale v. Insurance Co.*, (Miss.) 36 So., 568.

mination of all the issues in a single chancery proceeding. The doctrine as thus announneed is undoubtedly correct upon principle and is supported by the better considered adjudications.<sup>81</sup>

§ 64. **Fears of future actions insufficient; injunction not allowed to prevent injunction; not allowed because of unconstitutional statute.** It is to be observed, however, that mere apprehensions or fears on the part of the person seeking relief that the defendant may institute actions against him in the future will not warrant a court of equity in enjoining the bringing of such actions.<sup>82</sup> Nor will a court of equity powers grant an injunction for the purpose of preventing defendant in the injunction suit from bringing an action for an injunction against complainant in that suit, since equity will not entertain jurisdiction upon the ground that another court of competent jurisdiction may decide improperly.<sup>83</sup> Especially will the relief be refused in such case when a defendant in an action is expressly authorized by statute to apply to the same court for an injunction concerning the subject-matter in controversy.<sup>84</sup> Nor will the court enjoin threatened prosecutions at law upon the ground of the unconstitutionality of an act of legislature under which the prosecutions are about to be brought, since such alleged unconstitutionality can not of itself be made a ground of equitable jurisdiction.<sup>85</sup>

§ 65. **Multiplicity of suits further defined.** It is also to be borne in mind that relief by injunction for the prevention of a multiplicity of suits is allowed only when the subject-matter of the various litigations as well as the parties thereto

<sup>81</sup> *Turner v. City of Mobile*, 135 Ala., 73, 33 So., 132; *Scottish Union Insurance Co. v. Mohlman*, 73 Fed., 66; *Winslow v. Jenness*, 64 Mich., 84, 30 N. W., 905; *Douglass v. Boardman*, 113 Mich., 618, 71 N. W., 1100.

reversing S. C., 7 Lans., 151; *Wallack v. Society*, 67 N. Y., 23; *Williams v. Brown*, 127 N. C., 51, 37 S. E., 86.

<sup>83</sup> *Id.*

<sup>84</sup> *Wallack v. Society*, 67 N. Y., 23.

<sup>82</sup> *Wolfe v. Burke*, 56 N. Y., 115,

<sup>85</sup> *Id.*

are substantially the same. And the fact of different suits having been brought, each having a distinct object, founded on distinct and separate ground, and brought by different persons does not constitute such a multiplicity of suits as to bring the case within the rule and to warrant an injunction.<sup>86</sup> And the pendency of other actions brought by various persons against a defendant for the same subject-matter, in the same and other states affords no ground for enjoining the prosecution of a suit against him.<sup>87</sup>

§ 65 *a*. **The same.** It is to be observed that in order to justify relief by injunction for the prevention of a multiplicity of suits, there must be some common subject-matter in controversy or some common right or interest therein, and that without this, a mere community of interest in the questions of law and fact to be determined constitutes no basis for equitable relief.<sup>88</sup> Thus, where numerous actions at law have been brought by separate plaintiffs against the same defendant to recover damages resulting from a fire started by sparks from complainant's locomotive, the mere fact that the questions of law and of fact are the same in all the actions and that the various parties have a common interest in those questions will not authorize an injunction against the prosecution of the actions and the determination of the issues in equity.<sup>89</sup> Where, however, the questions in controversy in numerous actions at law brought by various plaintiffs all depend for their solution upon an act which is present and continuing and which therefore may give rise to continuous and repeated litigation, and where, in addition to a common interest in the questions of law and fact involved, there is a community

<sup>86</sup> *Haines v. Carpenter*, 91 U. S., 254. *town Sulphur, C. & I. Co. v. Fain*, 109 Tenn., 56, 70 S. W., 813; *Turner v. City of Mobile*, 135 Ala., 73, 33 So., 132.

<sup>87</sup> *Lightfoot v. Planters Bank- ing Co.*, 58 Ga., 136.

<sup>88</sup> *Tribette v. I. C. R. Co.*, 70 Miss., 182, 12 So., 32, 19 L. R. A., 660, 35 Am. St. Rep., 642; *Duck-*

<sup>89</sup> *Tribette v. I. C. R. Co.*, 70 Miss., 182, 12 So., 32, 19 L. R. A., 660, 35 Am. St. Rep., 642.

of interest or a common right or title in the subject-matter of the controversy, equity has jurisdiction to enjoin the prosecution of the actions at law and determine all the issues in a single equitable proceeding.<sup>90</sup>

§ 66. **Injunction allowed where defense can not be made at law; inequitable defenses enjoined.** The beneficial effects of the jurisdiction of equity in restraint of proceedings at law are nowhere more apparent than in that class of cases where the equities relied upon can not, under the rigid rules of law, be entertained as a defense to the action in the legal forum. Thus, the failure or total want of consideration for negotiable paper, although available as a defense to an action between the original parties, is not admissible where the action is brought against an indorsee in good faith and for valuable consideration, and resort must be had to equity to establish defendant's rights. And where a negotiable instrument or note, without consideration, is valid upon its face, the jurisdiction of equity is well established to interfere and restrain suit upon such instrument. Thus, where a negotiable note, valid upon its face, had been given without any consideration, and upon an agreement that it should be given up to the maker upon the happening of a certain contingency, which had happened, and an action at law was afterward brought upon such note by the payees against the personal representatives of the maker, the suit was enjoined.<sup>91</sup> And this for the reason already noticed, that the illegality of the instrument is not apparent on its face, but is dependent upon evidence *dehors* the instrument itself, whereby the defense might fail through lapse of time.<sup>92</sup> And where a note was signed and delivered without consideration, and with the

<sup>90</sup> *Illinois Central R. Co. v. Gar-  
rison*, 81 Miss., 257, 32 So., 996, 95  
Am. St. Rep., 469.

*C. E. Green*, 270, affirmed on ap-  
peal, 4 C. E. Green, 457.

<sup>92</sup> *Bromley v. Holland*, 5 Ves.,  
617; *Hayward v. Dimsdale*, 17 Ves.,  
111.

<sup>91</sup> *Metler's Adm'r's v. Metler*, 3



understanding that it should not be enforced, equity will enjoin a suit thereon by the administrators of the payee, since the note can have no more obligatory effect in their hands than it would have had in the hands of their intestate.<sup>93</sup> So a surety upon an official bond may restrain the prosecution of an action at law against him upon the bond, upon the ground of equitable defenses which can not be interposed in the suit at law.<sup>94</sup> And upon similar principles, equity may enjoin the prosecution of an action before a justice of the peace upon the ground that the defendant in that suit has a counterclaim, growing out of the same transaction as that involved in the suit, which is greater in amount than that of the jurisdiction of the justice court and which therefore can not be set off in that suit.<sup>95</sup> And where the defendant, upon establishing a defense to an action at law brought in a court of limited jurisdiction, would be entitled to affirmative relief resulting from establishing such defense which the court would be without jurisdiction to grant, the prosecution of the action may be enjoined and the whole case heard in a court of general equity powers.<sup>96</sup> And equity has jurisdiction, when necessary for the protection of the equitable rights of a suitor, to restrain his adversary from setting up an inequitable defense in an action at law, as well as from prosecuting an inequitable action.<sup>97</sup> So one who has fraudulently come into the possession of promissory notes has been enjoined from using them in evidence in actions brought thereon.<sup>98</sup> So also where a defendant has fraudulently procured a deed which is calculated to cast a cloud upon the plaintiff's title to real estate, equity may enjoin the introduction of such deed in evidence in an ejectment suit based thereon.<sup>99</sup>

<sup>93</sup> *Bell v. Gamble*, 9 *Humph.*, 117.

<sup>97</sup> *Dodd v. Wilson*, 4 *Del. Ch.*,

<sup>94</sup> *Penn v. Ingles*, 82 *Va.*, 65. 399.

<sup>95</sup> *Gregory v. Diggs*, 113 *Cal.*, 196, 45 *Pac.*, 261.

<sup>98</sup> *Lannes v. Courege*, 31 *La. An.*, 74.

<sup>96</sup> *National Bank v. Carlton*, 96 *Ga.*, 469, 23 *S. E.*, 388.

<sup>99</sup> *Rogers v. Rogers*, 37 *West Va.*, 407, 16 *S. E.*, 633.

**§ 67. Failure of consideration as ground for enjoining suit.**

Upon similar principles equity will restrain suits upon instruments, the consideration for which, though good originally, has since entirely failed, and where great hardship would result from the enforcement of payment. Thus, where the consideration for which a draft was given has entirely failed, a suit thereon may be enjoined, regardless of whether the equities alleged constitute a good defense at law, since the draft, being still transferable, might become the foundation for other suits, and the complainant be thereby greatly harassed.<sup>1</sup> So a suit upon a note may be temporarily enjoined on the ground that the property which was the consideration for the note has been forfeited to the government by vendor's acts before sale, vendee having brought suit in another jurisdiction to recover the property from the government.<sup>2</sup> It is held, however, that mere unsoundness of the property which constituted the consideration for the note, in the absence of warranty and wilful deceit, affords no ground for an injunction.<sup>3</sup> Where one partner sells to the other his interest in the partnership property upon an implied warranty of title, the circumstance of creditors of the firm afterward levying upon and selling the property is such a failure of consideration as will authorize a court of equity to entertain a bill on behalf of the sureties of the purchaser to enjoin proceedings at law for the purchase money.<sup>4</sup>

**§ 68. Criminal proceedings not enjoined; nor mandamus; exceptions.** Since courts of equity deal only with civil and property rights, they will not interfere by injunction with criminal proceedings, having no jurisdiction or power to afford relief in such cases. Jurisdiction over such actions is conferred upon courts especially created to hear them and, with few exceptions, it is beyond the power of equity to control or in any manner interfere with such proceedings by in-

<sup>1</sup> *Ferguson v. Fisk*, 28 Conn., 501.

<sup>3</sup> *Jackson v. Andrews*, 28 Ga., 17.

<sup>2</sup> *Carswell v. Macon*, 38 Ga., 403.

<sup>4</sup> *Hough v. Chaffin*, 4 Sneed, 238.

junction.<sup>5</sup> And this is true even though the court of equity already has jurisdiction of the parties and of the subject-matter concerning which the criminal action is instituted. Where, therefore, a bill is pending for relief in equity, the court will not enjoin the plaintiff in that suit from prosecuting criminal proceedings against the same defendants and concerning the same subject-matter.<sup>6</sup> Nor will equity entertain a bill for an injunction to restrain proceedings upon a *mandamus* in a court of law, and a demurrer to such a bill will therefore be sustained.<sup>7</sup> So equity will not interfere by injunction to

<sup>5</sup> *Kerr v. Corporation of Preston*, 6 Ch. D., 463; *Saull v. Browne*, L. R. 10 Ch., 64; *Crighton v. Dahmer*, 70 Miss., 602, 13 So., 237, 21 L. R. A., 84, 35 Am. St. Rep., 666; *In re Sawyer*, 124 U. S., 200, 8 Sup. Ct. Rep., 482; *Harkrader v. Wadley*, 172 U. S., 148, 19 Sup. Ct. Rep., 119; *Moses v. Mayor*, 52 Ala., 198; *Joseph v. Burk*, 46 Ind., 59; *Gault v. Wallis*, 53 Ga., 675; *Phillips v. Mayor*, 61 Ga., 386; *Garrison v. City of Atlanta*, 68 Ga., 64; *New H. S. M. Co. v. Fletcher*, 44 Ark., 139; *Portis v. Fall*, 34 Ark., 375; *Medical and Surgical Institute v. City of Hot Springs*, 34 Ark., 559; *Home Savings & T. Co. v. Hicks*, 116 Ia., 114, 89 N. W., 103; *State v. Theard*, 48 La. An., 1448, 21 So., 28; *Lecourt v. Gaster*, 49 La. An., 487, 21 So., 646; *Osborn v. Charlevoix Circuit Judge*, 114 Mich., 655, 72 N. W., 982; *State v. Wood*, 155 Mo., 425, 56 S. W., 474, 48 L. R. A., 596; *Suess v. Noble*, 31 Fed., 855; *Hemsley v. Myers*, 45 Fed., 283; *Davis, etc. Mfg. Co. v. City of Los Angeles*, 115 Fed., 537. And see *Arbuckle v. Blackburn*, 51 C. C. A., 122, 113 Fed., 616.

<sup>6</sup> *Saull v. Browne*, L. R. 10 Ch., 64. Lord Chief Justice Holt, of the Queen's Bench, is reported to have said in the case of *Holderstaffe v. Saunders*, 6 Mod., 16: "Surely chancery will not grant an injunction in a criminal matter under examination in this court; and that if they did, this court would break it, and protect any that would proceed in contempt of it."

<sup>7</sup> *Montague v. Dudman*, 2 Ves. Sr., 396. Lord Chancellor Hardwicke says, p. 398: "If I should overrule this demurrer I should open a new door of jurisdiction to this court, which I believe would afford a source of very great inconvenience and mischief, and bring all the corporation and borough cases in this kingdom in some shape or other on the foot of discovery or relief. This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*; nor to an indictment, nor to any information, nor to a writ of prohibition, that I know of. The reason is that a *mandamus* is not a writ remedial but man-da-

restrain municipal officers from the prosecution of suits for the violation of city ordinances, such proceedings being of a *quasi* criminal nature, since equity will not interfere with the execution of the criminal law, whether pertaining to the state at large, or to municipalities, which are agents in the administration of civil government.<sup>8</sup> And where under a statute for the prevention of cruelty to animals an officer is authorized to arrest all offenders found violating the statute, a court of equity will not enjoin such officer from making arrests upon the ground that the acts complained of are not in violation of the statute, and because of the injury which would result to plaintiff's business, since equity will not thus interfere with the execution of the criminal laws.<sup>9</sup> If, however, the act concerning which an arrest or criminal prosecution is threatened affects civil property and its enjoyment, in protecting the property right, equity may properly enjoin the

tory. It is vested in the king's superior court of common law to compel inferior courts to do something relative to the public. That court has a great latitude and discretion in cases of that kind; can judge of all the circumstances, and is not bound by such strict rules as in cases of private rights. That, therefore, must be given up as any color for such an injunction."

<sup>8</sup> *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207, 23 Sup. Ct. Rep. 498; *Moses v. Mayor*, 52 Ala., 198; *Taylor v. City of Pine Bluff*, 34 Ark., 603; *Chicago, B. & Q. R. Co. v. Ottawa*, 148 Ill., 397, 36 N. E., 85; *Golden v. City of Guthrie*, 3 Okla., 128, 41 Pac., 350; *Phillips v. Mayor*, 61 Ga., 386; *Mayor v. Patterson*, 109 Ga., 370, 34 S. E., 600; *City of Bain-*

*bridge v. Reynolds*, 111 Ga., 758, 36 S. E., 935; *Paulk v. Mayor*, 104 Ga., 24, 30 S. E., 417, 41 L. R. A., 772, 69 Am. St. Rep., 128, distinguishing *City of Atlanta v. Gate C. G. L. Co.*, 71 Ga., 106. *Contra*, *Sylvester Coal Co. v. City of St. Louis*, 130 Mo., 323, 32 S. W., 649, 51 Am. St. Rep., 566, where the court seek to sustain the jurisdiction in order to prevent a multiplicity of suits although there is nothing to show that the complainants were being harassed by continuous and repeated prosecutions; and upon the further ground that the ordinance, though penal, was not criminal in its nature,—a distinction which is without the support of authority.

<sup>9</sup> *Davis v. American Society*, 75 N. Y., 362.

criminal prosecution. But in such case its interference is founded solely upon the ground of injury to property and the necessity of preserving property rights.<sup>10</sup> And where such rights are not clearly involved, the relief will be denied.<sup>11</sup> A still further exception to the rule which forbids equitable interference with criminal prosecutions has been recognized in cases where such proceedings are instituted by parties to a suit already pending in equity, for the purpose of testing the same right as that in issue in the equitable action. A court of equity may always impose conditions upon a suitor seeking its aid, and hence, in order to protect its prior jurisdiction, it may compel him to abandon the criminal prosecution until a final determination of the whole matter in equity.<sup>12</sup>

§ 69. **Suit on fraudulent foreign judgment enjoined; remedy at law defined.** An injunction will lie to restrain an action brought upon a foreign judgment when such judgment was obtained through fraud. And the fact that the aggrieved party in such a case might have relief by applying to the court in which the judgment was rendered for a new trial will not prevent relief in equity; since a remedy

<sup>10</sup> *Dobbins v. City of Los Angeles*, — U. S., —, 25 Sup. Ct. Rep., 18; *City of Atlanta v. Gate C. G. L. Co.*, 71 Ga., 106, distinguished in *Paulk v. Mayor*, 104 Ga., 24, 30 S. E., 417, 41 L. R. A., 772, 69 Am. St. Rep., 128; *Milwaukee E. R. & L. Co. v. Bradey*, 108 Wis., 467, 84 N. W., 870; *Schlitz Brewing Co. v. City of Superior*, 117 Wis., 297, 93 N. W., 1120; *Schaudler Bottling Co. v. Welch*, 42 Fed., 561; *Southern Express Co. v. Mayor*, 116 Fed., 756. And see *Greenwich Insurance Co. v. Carroll*, 125 Fed., 121. In *City of Hutchinson v. Beckman*, 55 C. A., 333, 118 Fed., 399, where the

plaintiff and his agents were being annoyed and harassed by continued and unnecessary arrests and prosecutions for the violation of an alleged illegal ordinance the validity of which could be determined in a single one, the court entertained jurisdiction of a bill in the nature of a bill of peace although complainant's right had not been established at law.

<sup>11</sup> *Hemsley v. Myers*, 45 Fed., 283.

<sup>12</sup> *In re Sawyer*, 124 U. S., 200, 8 Sup. Ct. Rep., 482; *Spink v. Francis*, 19 Fed., 670; *Wadley v. Blount*, 65 Fed., 667.



at law which will bar relief in equity must be one which the courts of the same state can apply, and not a remedy which is to be sought in the courts of another state.<sup>13</sup>

§ 70. **Unconscionable bargains with expectant heirs; gambling contracts.** Equity may afford relief by injunction against unconscionable bargains made with expectant heirs, the jurisdiction in such cases being based upon the ground of fraud, independent of any question of usury, and notwithstanding the usury laws have been abolished. And the court in such cases may enjoin actions at law upon bills of exchange thus obtained from expectant heirs, upon condition of payment of the amount actually due.<sup>14</sup> And an injunction has been granted to stay an action at law upon a gambling contract.<sup>15</sup> And it is held, under a statute giving a losing party the right to recover back any money deposited as margins under a wagering contract, that an injunction will lie to restrain the prosecution of an action at law based upon a note given as margins.<sup>16</sup>

§ 71. **Actions to recover penalty formerly enjoined; bond for purchase of office.** The English Court of Chancery formerly granted injunctions to restrain actions for the recovery of the penalty in a bond, when the only question was as to whether the amount was considered as a penalty or as assessed or liquidated damages. And in such cases the court would retain the injunction until the hearing, and would order an issue *quantum damnificatus* to determine the real damages.<sup>17</sup> And where an action at law was brought upon a bond given for the purchase of an office, Lord Thurlow granted an injunction, which he afterward made perpetual, upon grounds

<sup>13</sup> *Stanton v. Embry*, 46 Conn., 595.

<sup>16</sup> *Rice v. Winslow*, 182 Mass., 273, 65 N. E., 366.

<sup>14</sup> *Earl of Aylesford v. Morris*, L. R. 8 Ch., 484.

<sup>17</sup> *Sloman v. Walter*, 1 Bro. C. C., 418. See also *Errington v. Ayres*, 2 Bro. C. C., 341.

<sup>15</sup> *Earl of Milltown v. Stewart*, 3 Myl. & Cr., 18, affirming S. C., 8 Sim., 371.

of public policy.<sup>18</sup> It is difficult, however, to reconcile these decisions with the now well established rule denying relief by injunction against actions at law upon grounds which might be urged in defense of such actions, and it is believed that courts of equity would not now entertain jurisdiction in cases of the nature above discussed.

§ 72. **Solicitor enjoined from acting in adverse capacity.** A court of equity may enjoin a solicitor from acting in an adverse capacity against an estate or person for whom and in a matter in which he has formerly acted professionally, and may enjoin him from communicating adversely any information in relation to matters which have come to his knowledge in such professional capacity.<sup>19</sup> And the application for the injunction in such case may be made merely upon motion, and without instituting a new proceeding for that purpose.<sup>20</sup>

§ 73. **Suits against receivers, when enjoined.** The jurisdiction of equity by injunction against actions at law is also frequently invoked in behalf of receivers for the purpose of protecting them against litigation in other courts. Indeed, courts of equity are exceedingly jealous in guarding and protecting their officers against unauthorized litigation, and will not usually permit their receivers to be sued without leave being first granted for that purpose by the court appointing the receiver.<sup>21</sup> Where, therefore, an action has been brought against a receiver without leave of court first obtained, the prosecution of such unauthorized action may be enjoined by

<sup>18</sup> *Harrington v. Du Chatel*, 1 Bro. C. C., 125; *Harrington v. Co.*, 20 Ch. D., 733.  
*Chastel, Dick.*, 581.

<sup>19</sup> *Biggs v. Head, Sau. & Sc.*, 335; *Hobhouse v. Hamilton*, *Ib.*, 359; *Brady v. Lawless*, *Ib.*, 365; *Davies v. Clough*, 8 Sim., 262; *Cholmondeley v. Clinton*, 19 Ves., 261. See also *Little v. Kingswood Collieries*, 20 Ch. D., 733.  
<sup>20</sup> *Biggs v. Head, Saw. & Sc.*, 335.  
<sup>21</sup> *Taylor v. Baldwin*, 14 Abb. Pr., 166; *De Groot v. Jay*, 30 Barb., 483; *S. C.*, 9 Abb. Pr., 364; *Miller v. Loeb*, 64 Barb., 454; *Randfield v. Randfield*, 3 De G., F. & J., 766, reversing *S. C.*, 1 Dr. & Sm., 310.

the court appointing the receiver.<sup>22</sup> And when a person is proceeding by action at law to assert his right to property held by a receiver without first having obtained leave of court to institute such action, he may be enjoined upon the application of the receiver from proceeding with his action, regardless of however clear his right may be, or of whether he was apprised of the receiver's appointment at the time of instituting his action.<sup>23</sup> So where tenants, without leave of court, have brought actions of trespass or replevin against a receiver who has distrained for their rent, it is proper to enjoin them from proceeding with such unauthorized suits.<sup>24</sup> And a court of equity may interfere by injunction to protect its receiver against unauthorized litigation, even though the person enjoined is proceeding to enforce a legal right in the manner prescribed by statute. Thus, where real estate is in the custody of a receiver, and a railway company, desiring a portion of it for the construction of its road, begins proceedings for a condemnation in accordance with the statute, an injunction may be granted to restrain such proceedings until further order.<sup>25</sup> But an action against a receiver in his official capacity for matters pertaining to his receivership will not be enjoined, upon motion of the receiver, merely on the ground that the controversy involved in the action has already been passed upon by the court in other proceedings; since, if this be true, it furnishes a complete and sufficient defense to the action which it is sought to enjoin, and the receiver should avail himself of such defense in that action.<sup>26</sup> Nor will courts of equity ordinarily entertain a bill for an injunction against their own receivers, the appropriate remedy for persons who are aggrieved or dissatisfied with the action

<sup>22</sup> *Evelyn v. Lewis*, 3 Hare, 472; *Tink v. Rundle*, 10 Beav., 318; *In re Persse*, 8 Ir. Eq., 111; *Parr v. Bell*, 9 Ir. Eq., 55.  
<sup>24</sup> *In re Persse*, 8 Ir. Eq., 111; *Parr v. Bell*, 9 Ir. Eq., 55.  
<sup>25</sup> *Tink v. Rundle*, 10 Beav., 318.  
<sup>26</sup> *Jay's Case*, 6 Abb. Pr., 293.

<sup>23</sup> *Evelyn v. Lewis*, 3 Hare, 472.

of a receiver being to apply to the court which has appointed him for relief, rather than to seek to enjoin him by another suit.<sup>27</sup>

§ 74. **Suits against infants, when enjoined.** Courts of equity have always shown a tendency to a liberal exercise of their jurisdiction for the protection of infants; and when two different suits are instituted in behalf of an infant by two different persons, each claiming to act as his next friend, equity may determine which of the two should proceed, and may then enjoin proceedings in the other suit.<sup>28</sup>

§ 75. **Landlord and tenant.** As between landlord and tenant, it is to be observed that courts of equity are generally averse to interfering by injunction to restrain proceedings at law by the landlord, either for the recovery of rent or of the possession of the demised premises.<sup>29</sup> And equity will not interfere at the suit of a tenant to restrain the landlord from proceeding with a distress for rent upon the ground that the rent has been fully paid; since in such case ample relief may be had by an action at law, in replevin or otherwise, for the illegal distress.<sup>30</sup> Nor will the landlord be enjoined from proceedings at law to dispossess the tenant upon the ground of a promise that the tenant should have the premises for another year.<sup>31</sup> So the destruction of the demised premises by fire does not afford sufficient ground for enjoining an action at law for the recovery of the rent, the lease containing no provision for a suspension of the rent in case of fire.<sup>32</sup> While, as thus shown, equity will not ordinarily interfere to restrain a landlord from pursuing his legal remedies against the tenant, yet in an action by a tenant for the specific performance of a

<sup>27</sup> *Smith v. Earl of Effingham*, 2 Cheetham, 1 Sim., 146; *Phillips v. Beav.*, 232; *Winfield v. Bacon*, 24 Jones, 9 Sim., 519.  
<sup>28</sup> *Barb.*, 154.

<sup>29</sup> *Morrison v. Bell*, 5 Ir. Eq., 354.

<sup>30</sup> *Banks v. Busey*, 34 Md., 437;  
<sup>31</sup> *Rapp v. Williams*, 1 Hun, 716;  
<sup>32</sup> *Rapp v. Williams*, 1 Hun, 716; *S. C.*, 4 *Thomp. & C.*, 174; *Leeds v.*

<sup>30</sup> *Banks v. Busey*, 34 Md., 437.

<sup>31</sup> *Rapp v. Williams*, 1 Hun, 716;  
*S. C.*, 4 *Thomp. & C.*, 174.

<sup>32</sup> *Leeds v. Cheetham*, 1 Sim., 146.

covenant by the landlord to repair and protect the premises, it has been held proper to enjoin the landlord from statutory proceedings to dispossess the tenant and to annul the lease, the relief being granted in such case upon the ground that the tenant had no adequate remedy at law.<sup>33</sup>

§ 76. **Usurious contracts.** Where relief by injunction is sought against proceedings at law upon usurious contracts, the courts enforce a strict observance of the principle that he who would have equity must do equity. And unless the person aggrieved first pays or offers to pay the amount lawfully due upon the contract, he will not be permitted to enjoin proceedings at law.<sup>34</sup> And it is held that the amount due must be actually tendered or produced in court with lawful interest.<sup>35</sup> If, however, defendant answers without taking advantage of this objection, an injunction already granted will not be dissolved where complainant offers to pay the amount due.<sup>36</sup> And where plaintiff files his bill to redeem certain collateral securities which he has deposited as security for usurious loans, he may, in a proper case, have an injunction to restrain defendant from enforcing the usurious contract by the collection or enforcement of the security.<sup>37</sup>

§ 77. **Attachment suits.** An injunction is the proper remedy for the protection of creditors in a foreign attachment, who are entitled to a priority of claim over creditors subsequently attaching.<sup>38</sup> But a suit in attachment will not be restrained on the ground that the amount claimed is so large

<sup>33</sup> *Valloton v. Seignett*, 2 Abb. Pr., 121.

<sup>34</sup> *Rogers v. Rathbun*, 1 Johns. Ch., 367; *Tupper v. Powell*, Ib., 439; *Fanning v. Dunham*, 5 Johns. Ch., 122; *Morgan v. Schermerhorn*, 1 Paige, 544; *Miller v. Ford*, Saxt., 358. See, as to an injunction to restrain the sale of securities pledged as collateral to a loan, *Caldwell*

*v. Commercial Warehouse Co.*, 1 Hun, 718; S. C., 4 Thomp. & C., 179.

<sup>35</sup> *Rogers v. Rathbun*, 1 Johns. Ch., 367; *Tupper v. Powell*, Ib., 439.

<sup>36</sup> *Morgan v. Schermerhorn*, 1 Paige, 544.

<sup>37</sup> *Binford v. Boardman*, 44 Iowa 53.

<sup>38</sup> *Erskine v. Staley*, 12 Leigh, 406; *Moore v. Holt*, 10 Grat., 284.



that defendant, being a non-resident, can not obtain the necessary security to dissolve the attachment, and that his inability to procure such security will deprive him of the privilege of introducing a defense of set-off.<sup>39</sup> Nor will a court of equity enjoin proceedings in attachment upon the application of a third person not a party to the litigation, and when no prejudice is shown as likely to result to complainant from the attachment suit.<sup>40</sup>

§ 78. **Awards and arbitrators.** Equity will enjoin an action at law upon an award of arbitrators on the ground of improper conduct on the part of the arbitrators in making the award. Thus, where they had received evidence from a witness on one side, of which the other party was not apprised or notified, and to which he had no opportunity of replying, the proceedings were enjoined, even though the arbitrators positively disclaimed being influenced by such *ex parte* evidence.<sup>41</sup> And equity may enjoin an arbitrator from acting, upon the ground of partiality, and when it is apparent to the court that he is not a fit person to act, and when it is not probable that he will faithfully and honestly discharge his duty.<sup>42</sup> So equity has jurisdiction to enjoin the bringing of an action at law upon an award given under the terms of a fire insurance policy, upon the ground that it was obtained by means of false and fraudulent testimony given by the defendant.<sup>43</sup> But an action upon an award will not be enjoined merely to give one who has gone voluntarily to trial an opportunity to secure the impeachment of witnesses, when he had been apprised beforehand of the nature of their evidence.<sup>44</sup> Nor will the relief be allowed where the person aggrieved has been guilty of laches

<sup>39</sup> *Dungan v. Miller*, 4 C. E. — <sup>43</sup> *North British & M. I. Co. v. Lathrop*, 17 C. C. A., 175, 70 Fed., 218.

<sup>40</sup> *Williams v. Stewart*, 56 Ga., 429.  
663.

<sup>41</sup> *Cliland v. Hedly*, 5 R. I., 163. <sup>44</sup> *Woodworth v. Van Buskerk*, 1 Johns. Ch., 432.

<sup>42</sup> *Beddow v. Beddow*, 9 Ch. D.,

in applying for the injunction or where his conduct has been such as to estop him from relief in equity.<sup>45</sup>

§ 79. **Change of venue; absence of witness; statute of limitations.** Proceedings at law may be enjoined and a change of venue had where the facts relied upon have come to the knowledge of complainant too late to apply for a change of venue at law.<sup>46</sup> But the relief will not be granted because of the refusal of the court to postpone the trial on account of the absence of a material witness, since that is a matter entirely within the discretion of the court of law, with the exercise of which discretion equity will not interfere.<sup>47</sup> Nor will an injunction be allowed to restrain defendant from pleading the statute of limitations, except in a plain case of fraudulent abuse of the lapse of time. And in the absence of such fraud and of any contract or stipulation that delay in bringing suit should not prejudice the rights of the parties, an injunction will be refused.<sup>48</sup>

§ 80. **Bond for purchase money.** One who has purchased personal property at a sale under execution, which is afterward proved to belong to a person other than the judgment debtor, who recovers it by due course of law, is not entitled to an injunction to restrain proceedings upon his bond given for the purchase money.<sup>49</sup>

§ 81. **Proceedings under United States revenue laws rarely enjoined.** Courts of equity will rarely interfere with the legal rights of the United States government under the revenue laws; and if justice is done under their provisions as to penal-

<sup>45</sup> *Jones v. Bennett*, 1 Bro. P. C. 528; *Smith v. Whitmore*, 1 H. & M., 576.

<sup>46</sup> *Darmsdatt v. Wolfe*, 4 Hen. & M., 246.

<sup>47</sup> *Hamilton v. Dobbs*, 4 C. E. Green, 227.

<sup>48</sup> *Bank v. Hill*, 10 Humph., 176.

See also *Andrae v. Redfield*, 12 Blatch., 407, where an injunction was refused which was sought to restrain defendant from pleading the statute of limitations in bar of an action.

<sup>49</sup> *McGhee v. Ellis*, 4 Lit., 244;

*Fawcett v. Pendleton*, 5 Lit., 136.

ties and forfeitures, relief must be had by application to the treasury department, and not by injunction in equity.<sup>50</sup>

§ 82. **Trust; insolvency of maker of note.** Where the relief is sought on the ground that the subject-matter of the suit, being a trust, is within the jurisdiction of equity, the proceedings at law should not be enjoined, but only execution upon the judgment which may be recovered.<sup>51</sup> But a suit upon a note will not be enjoined, for the protection of other creditors of the maker, on the ground that he was insolvent at the time when legal proceedings were instituted, since the mere fact of such insolvency does not invalidate or render fraudulent a note given for a *bona fide* indebtedness.<sup>52</sup>

§ 83. **Effect of the injunction; mandamus not allowed.** The effect of an injunction staying proceedings at law against the principal, where special bail has been taken, is to tie up the hands of plaintiff in the action at law so that no proceedings can be had against the special bail.<sup>53</sup> And where the action enjoined was at issue and ready for trial when the injunction issued out of chancery restraining proceedings, plaintiff in the action at law will not be allowed to proceed to trial and judgment on the ground of saving of time and expense.<sup>54</sup> So when an injunction has been granted against the prosecution of an action at law, *mandamus* will not lie to compel the court to proceed with the trial of the cause.<sup>55</sup>

§ 84. **Acceptance of goods from debtor; fraudulent decree; imprisonment for debt.** A suit for the collection of a debt will not be restrained because the plaintiff has accepted of his debtor certain goods, with the understanding that they were in satisfaction of the debt, if not taken from him by

<sup>50</sup> Powell v. Redfield, 4 Blatch., 45.

<sup>51</sup> Justice v. Scott, 4 Ired. Eq., 108.

<sup>52</sup> Savage v. Ball, 2 C. E. Green, 142.

<sup>53</sup> Webster v. Chew, etc., 3 Har. & McHen., 123.

<sup>54</sup> Hutchinson v. Hutchinson's Ex'rs, 1 Houst., 613.

<sup>55</sup> People v. Circuit Judge, 40 Mich., 63.

superior liens, unless the debtor seeking the injunction can show that there were no superior liens outstanding.<sup>56</sup> Nor will an injunction be granted to restrain proceedings at law to recover damages against one who has fraudulently obtained a decree in chancery which has been set aside on account of such fraud.<sup>57</sup> But it is held that equity has jurisdiction to enjoin proceedings against the person and equitable assets of a debtor, under a statute abolishing imprisonment for debt, and providing for the punishment of fraudulent debtors.<sup>58</sup>

§ 85. **Dismissal of suit, when enjoined; lost agreement.** Equity will, in a proper case, interfere to prevent the dismissal of an action at law. Thus, where defendant in the injunction suit has, upon good consideration, given complainant a power of attorney to bring an action at law in his own name, but for complainant's benefit, the dismissal of the suit by the nominal plaintiff will be enjoined.<sup>59</sup> But an injunction against a suit at law, the only equity in favor of which is a written agreement alleged to be lost, will not be retained where the bill does not state that proof of the contents of the lost agreement can be given by parol, the answer denying all knowledge of such agreement, and stating facts inconsistent therewith.<sup>60</sup>

§ 86. **Garnishees.** Under a statute authorizing injunctions against defendants for certain specified causes, a garnishee is regarded as a defendant within the terms of the statute, and an injunction may be granted against him as such.<sup>61</sup> But an injunction will not be allowed before trial at law to restrain a garnishee from disposing of the debtor's property in his hands, except upon a showing of the garnishee's insolvency and the consequent danger of loss.<sup>62</sup>

<sup>56</sup> *Camp v. Matheson*, 29 Ga., 351

<sup>60</sup> *Kent v. De Baun*, 1 Beas., 220.

<sup>57</sup> *Peck v. Woodbridge*, 3 Day,

<sup>61</sup> *Malley v. Altman*, 14 Wis., 22;

508.

*Almy v. Platt*, 16 Wis., 169.

<sup>58</sup> *Frost v. Myrick*, 1 Barb., 362.

<sup>62</sup> *Bigelow v. Andress*, 31 Ill., 322.

<sup>59</sup> *Monroe v. McIntyre*, 6 Ired.

Eq., 65.

§ 87. **Effect of the injunction on statute of limitations.**

The authorities are not wholly reconcilable concerning the effect of an injunction against proceedings at law in its operation upon the statute of limitations, and as to whether it suspends the operation of the statute. It was said in an early English case that if a party were staid by injunction from prosecuting his suit, the court would not permit him thereby to be prejudiced by the statute.<sup>63</sup> And in Maryland it has been held that the operation of the statute is suspended by an injunction against the enforcement of the cause of action, and that in such case a plea of the statute constitutes no defense.<sup>64</sup> And in Mississippi it is held that an injunction against the enforcement of a legal obligation prevents the statute from running during the pendency of the injunction suit.<sup>65</sup> And the United States Circuit Court of Appeals for the Fourth Circuit has held that an injunction against the prosecution of an action upon a fire insurance policy prevents the running of the contractual period of limitation named in the policy.<sup>66</sup> In New York, however, a contrary doctrine has been asserted, and it has there been held that an injunction does not have the effect of suspending the statute.<sup>67</sup> And it is held that where it is sought to defeat a plea of the statute of limitations by showing that an injunction had been granted against the enforcement of the contract, such reply will not avail if the injunction was obtained by a third person not a party to the contract, the statute not being suspended in such case.<sup>68</sup>

<sup>63</sup> *Anon.*, 2 Cases in Chancery, 217. As to the effect of an injunction against a judgment as extending the time within which an execution may issue upon the judgment, see *Wakefield v. Brown*, 38 Minn., 361.

<sup>64</sup> *Little v. Price*, 1 Md. Ch., 182.

<sup>65</sup> *Tishlmingo Savings Institu-*

*tion v. Buchanan*, 60 Miss., 496.

<sup>66</sup> *North British & M. I. Co. v. Lathrop*, 17 C. C. A., 175, 70 Fed., 429.

<sup>67</sup> *Barker v. Millard*, 16 Wend., 572.

<sup>68</sup> *Wilkinson v. First N. Ins. Co.*, 72 N. Y., 499, affirming S. C., 9 Hun, 522.



§ 88. **Effect of dissolving the injunction.** Upon the dissolution of an injunction to a suit at law, the court as a court of chancery has nothing further to do with the case, but should leave the parties to proceed at law with the suit enjoined. And it is error for the same court which has dissolved the injunction, sitting as a court of equity, to immediately enter up judgment in the action, sitting as a court of law.<sup>69</sup>

<sup>69</sup> *Powers v. Waters*, 8 Mo., 299.

## II. DEFENSE AT LAW.

- § 89. Proceedings at law not enjoined when defense may be made at law.
- 90. Illustrations of the rule.
  - 91. Cases of concurrent jurisdiction at law and in equity.
  - 92. The rule applied to cases of set-off.
  - 93. The rule applied regardless of merits of action or fears of injustice.
  - 94. Exceptions to the rule in cases of fraud.

§ 89. **Proceedings at law not enjoined when defense may be made at law.** The most frequent ground for refusing relief by injunction against a suit at law is that the defense urged may be used in the action at law itself, without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds of which the person aggrieved may avail himself in defense of the action at law.<sup>1</sup> In illustration of the rule, where complainant files a bill to set aside certain securities as void and is afterward sued at law upon the securities, having a good defense to the

<sup>1</sup> *New York D. D. Co. v. American L. I. & T. Co.*, 11 Paige, 384; *Wolf Lumber Co. v. Brown*, 88 Wis., 638, 60 N. W., 996; *Virginia Mining Co. v. Wilkinson*, 92 Va., 98, 22 S. E., 839; *Beauchamp v. Putnam*, 34 Ill., 378; *County of Cook v. City of Chicago*, 158 Ill., 524, 42 N. E., 67; *Andel v. Starkel*, 192 Ill., 206, 61 N. E., 356; *Smith v. Short*, 11 Ia., 523; *Home Savings & T. Co. v. Hicks*, 116 Ia., 114, 89 N. W., 103; *Saint Johns National Bank v. Township of Birmingham*, 113 Mich., 203, 71 N. W., 588; *Polk v. Gardner*, 67 Ark., 441, 55 S. W., 840; *Powell v. Chamberlain*, 22 Ga., 123; *Scottish Union & National Insurance Co. v. Bowland*, 196 U. S., 611, 25 Sup. Ct. Rep., 345; *Gibson v. Moore*, 22 Tex., 611; *Hewitt v. Kuhl*, 10 C. E. Green, 24; *Hardinge v. Webster*, 1 Drew. & Sm., 101; *De Worms v. Mellier*, L. R. 16 Eq., 554; *Olmsted's Appeal*, 86 Pa. St., 284; *Heath v. Heath*, 9 Ir. Eq., 635; *Anderson v. Dowling*, 11 Ir. Eq., 590. But see, *contra*, *Bullitt's Ex'rs v. Songster's Adm'rs*, 3 Munf., 55; *Evans v. Taylor*, 28 West Va., 184; *Pullman P. C. Co. v. Central T. Co.*, 34 Fed., 357; *Sweeney v. Williams*, 36 N. J. Eq., 459; *Jacobson v. Metzgar*, 43 Mich., 403; *Martin v. Orr*, 96 Ind., 27; *City of Seymour v. J. M. & I. R. Co.*, 126 Ind., 466, 26 N. E., 188.

action at law, he will not be allowed to enjoin the prosecution of such suit until after he has obtained a decree in equity.<sup>2</sup> Nor in such case will the neglect of the defendant in the chancery suit to object to the jurisdiction of the court entitle the complainant to a preliminary injunction restraining the suit at law.<sup>3</sup> So proceedings at law will not be enjoined on the ground of want of jurisdiction in the court in which the proceedings are instituted, since such want of jurisdiction may be relied upon in defense of the action at law.<sup>4</sup> And equity will not enjoin proceedings in another court of competent jurisdiction where adequate relief may be had by appeal from the order of such court.<sup>5</sup> Nor will the fact that plaintiff at law has no cause of action—as in an action of forcible entry and detainer that he has no title—warrant relief in equity against the suit.<sup>6</sup> So an injunction will be refused to a suit on a note, the only equity relied upon being that a certain payment has not been credited, and complainant making no tender of the remainder.<sup>7</sup> And the improper exclusion of evidence by the court in which the action is pending affords no ground for enjoining the action, since the appropriate remedy in such case is by appeal.<sup>8</sup> Nor does the fact that the proceedings sought to be enjoined are in a court of equity alter or vary the rule, since if the person aggrieved has a good defense to the equitable action it is equally as competent for him to urge such matter in his answer to that action as in a bill to enjoin.<sup>9</sup> So where the illegality of an instrument is apparent upon the face of the instrument itself, so that lapse of time can not

<sup>2</sup> New York D. D. Co. v. American L. I. & T. Co., 11 Paige, 384.

<sup>3</sup> Id.

<sup>4</sup> Gibson v. Moore, 22 Tex., 611; Jones v. Stallsworth, 55 Tex., 133; Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co., 76 Iowa, 702, 39 N. W., 691.

<sup>5</sup> People v. Coffin, 7 Hun, 608; Wright v. Fleming, 12 Hun, 469.

But see, *contra*, Pettigrew v. Foshay, 12 Hun, 483; Freeman v. Carpenter, 147 Mass., 23, 16 N. E., 714.

<sup>6</sup> Chadoin v. Magee, 20 Tex., 476.

<sup>7</sup> Powell v. Chamberlain, 22 Ga., 123.

<sup>8</sup> Wright v. Fleming, 12 Hun, 469.

<sup>9</sup> Hall v. Fisher, 1 Barb. Ch. R., 53.

weaken or take away the defense whenever action may be brought, there is no ground for relief in equity.<sup>10</sup> But where the illegality is only to be made apparent by evidence *dehors* the instrument, the rule is otherwise.<sup>11</sup>

§ 90. **Illustrations of the rule.** The general rule under discussion, denying relief by injunction upon grounds of which the party aggrieved might avail himself in defense of the action at law, is of such universal application that it may not be improper to adduce some further illustrations. Thus, equity will not enjoin the prosecution of condemnation proceedings upon grounds which could be raised and relied upon as a defense to such proceedings.<sup>12</sup> So an injunction will not be granted against an action at law because it is alleged to be frivolous and groundless, since in such case the person aggrieved may make adequate defense at law.<sup>13</sup> So the holder of a policy of life insurance will not be enjoined from prosecuting an action thereon upon the ground that the policy was obtained through fraudulent representations on the part of the insured, since such defense may properly be urged at law.<sup>14</sup> For the same reason an action at law brought by the assignee of a policy can not be enjoined upon the ground that the assent of the company to the assignment was fraudulently procured.<sup>15</sup> So proceedings in garnishment will not be enjoined where the facts and equities relied upon as the basis of the

<sup>10</sup> Gray *v.* Mathias, 5 Ves., 286. — Co. *v.* California & N. R. Co., 48

<sup>11</sup> Bromley *v.* Holland, 5 Ves., C. C. A., 517, 109 Fed., 509. But see, *contra*, City of Seymour *v.* J., 617.

<sup>12</sup> Illinois Central R. Co. *v.* City M. & I. R. Co., 126 Ind., 466, 26 of Chicago, 138 Ill., 453, 28 N. E., N. E., 188.

740; Chicago, Rock Island & P. R. Co. *v.* City of Chicago, 143 Ill., 641, 32 N. E., 178; Western Mary-  
<sup>13</sup> Kemp *v.* Tucker, L. R. 8 Ch. App., 569.

<sup>14</sup> Life Association *v.* McBlain, I. R. 9 Eq., 176; Home Life Ins. Co. *v.* Selig, 81 Md., 200, 31 Atl., 503.

<sup>15</sup> Home Life Ins. Co. *v.* Selig, R. Co., 6 Hun, 24; Eureka & K. R. 81 Md., 200, 31 Atl., 503.

injunction may be interposed in defense of the garnishee proceedings.<sup>16</sup> And a referee who has been appointed to take testimony in a pending cause will not be enjoined from acting upon the ground that his appointment was unauthorized, there being a plain and adequate remedy by appeal.<sup>17</sup> Nor will an action of replevin, brought for the recovery of chattels in the possession of a sheriff under the levy of an execution, be restrained upon a bill filed by the sheriff claiming the property to be in *custodia legis* since this defense could be raised in the replevin suit.<sup>18</sup> For the same reason an injunction will not be granted to enjoin the prosecution of an action at law brought to recover upon a judgment, upon the ground that the complainant was released from the judgment by a discharge in bankruptcy, since the discharge would constitute a good legal defense.<sup>19</sup> Nor will an action for the recovery of damages resulting from a nuisance be restrained upon the ground that the plaintiff is estopped from asserting the nuisance, such estoppel amounting to a legal defense to the suit at law.<sup>20</sup> Nor will equity enjoin the probate of a will upon the charge that it was procured through fraud and undue influence where such matters may properly be raised as a defense in the probate proceedings.<sup>21</sup> And where suits are brought at law against defendants for violations of a village ordinance against the sale of intoxicating liquors, equity will not entertain a bill to enjoin the actions, since whatever defenses can be made may be urged at law.<sup>22</sup> So prosecutions under a municipal ordinance will not be restrained upon the ground that complainant is not guilty of a violation since his guilt would be the sole issue in the prosecution.<sup>23</sup> Nor will

<sup>16</sup> Carr v. Lee, 44 Ga., 376.

<sup>20</sup> Roland Park Co. v. Hull, 92

<sup>17</sup> Shoemaker v. Axtell, 78 Ind., Md., 301, 48 Atl., 366.

561.

<sup>21</sup> Israel v. Wolf, 100 Ga., 339,

<sup>18</sup> Pickett v. Filer Co., 40 Fed., 28 S. E., 109.

313.

<sup>22</sup> Yates v. Village of Batavia, 79

<sup>19</sup> Saunders v. Huntington, 166 Ill., 500.

Mass., 96, 44 N. E., 127. And see, *post*, § 296.

<sup>23</sup> Shoemaker v. Entwisle, 1 App.



a court of equity enjoin proceedings for a writ of *mandamus*, when all defenses against such proceedings may be properly urged in that action, and when it is not shown that the rights of the person seeking the injunction can not be fully protected in the suit for *mandamus*.<sup>24</sup> And the fact that the plaintiff in an action at law which is sought to be enjoined has threatened to continue such actions against the defendant affords no ground for restraining the suit when the matter relied upon in defense may be interposed in the action at law: since if that action should proceed to judgment and the defense be established it could be pleaded in bar of other actions for the same cause.<sup>25</sup> The existence of a statutory remedy for the injury complained of is of itself sufficient cause for refusing an injunction. Thus, a sheriff will not be allowed to restrain suits brought against him for having in his official capacity sold property on execution to which there are conflicting rights, when he is by statute provided with ample remedy at law, and is not bound to act unless indemnified.<sup>26</sup>

### § 91. Cases of concurrent jurisdiction at law and in equity.

It is to be observed, also, that the doctrine under discussion is not limited to cases where courts of law alone have jurisdiction over the subject-matter of the litigation, but it is extended to cases over which concurrent jurisdiction exists at law and in equity.<sup>27</sup> And although a court of equity may have concurrent jurisdiction with a court of law over the subject in controversy, it will not restrain proceedings at law unless it can afford a more perfect remedy, or unless the nature of the case is such that it may be better tried in equity than at law. Equity will not, therefore, enjoin an action upon a foreign

D. C., 252; *Ludlow & C. C. Co. v. Storrs v. Payne*, 4 Hen. & M., City of Ludlow, 102 Ky., 354, 43 506.  
S. W., 435. <sup>27</sup> *Ochsenbein v. Papelier*, L. R.

<sup>24</sup> *People v. Wasson*, 64 N. Y., 167. 8 Ch. App., 695; *Hoare v. Brem-*

<sup>25</sup> *Hartman v. Heady*, 57 Ind., 545. ridge, L. R. 8 Ch. App., 22, affirm-  
ing S. C., L. R. 14 Eq., 522.

judgment upon the ground of fraud in obtaining the judgment, when such defense may be interposed in that action, and when the question of fraud may be better tried at law.<sup>28</sup> And where, upon weighing the relative convenience of the two methods of proceeding, it is found to be better to proceed at law, a court of equity will refuse to interfere by injunction, although it has concurrent jurisdiction over the controversy. Thus, in a suit in equity to enjoin the bringing of any action at law upon an insurance policy upon the ground that it was obtained through fraud, equity may properly refuse to enjoin when the matter may be more speedily and cheaply determined in an action at law upon the policy.<sup>29</sup>

§ 92. **The rule applied to cases of set-off.** The rule under discussion may be applied to cases of set-off, and equity will not enjoin proceedings at law for the collection of a debt upon the ground that defendant in the action at law has a demand against the plaintiff not yet due, but which he desires to set off against plaintiff's demand, the rule of set-off in such case being the same in equity as at law.<sup>30</sup> And the mere existence of a counter demand, or the pendency of an account between the parties out of which a cross demand may arise, does not create such an equitable offset as to warrant an injunction against an action at law.<sup>31</sup> But, while the existence of cross demands between the parties is not of itself sufficient to constitute an equitable set-off,<sup>32</sup> yet when the cross demands are of such a nature that if both were recoverable at law the one might be set off against the other, a court of equity may, if it has jurisdiction of the subject-matter, enforce the set-off by enjoining proceedings at law.<sup>33</sup> And a court of equity may

<sup>28</sup> *Ochsenbein v. Papelier*, L. R. Ch., 191; *Burton v. Wellen*, 6 Del. 8 Ch. App., 695. And see *Evans v. Ch.*, 403, 33 Atl., 675.  
<sup>29</sup> *Taylor*, 28 West Va., 184.

<sup>30</sup> *Hoare v. Bremridge*, L. R. 8 Ch. App., 22, affirming S. C., L. R. 14 Eq., 522.

<sup>31</sup> *Hewitt v. Kuhl*, 10 C. E. Green, 24.  
<sup>32</sup> *Rawson v. Samuel*, 1 Cr. & Ph., 161.

<sup>33</sup> *Hayes' Adm'r v. Hayes*, 2 Del. Clark v. Cort, 1 Cr. & Ph., 154.

enjoin the prosecution of an action at law pending a partnership accounting between the parties where the plaintiff in the suit at law is wholly insolvent and it is certain the settlement will show a balance in favor of the complainant.<sup>34</sup>

§ 93. **The rule applied regardless of merits of action or fears of injunction.** The general doctrine denying relief by injunction against actions at law, where full defense may be made in such actions, is applied regardless of whether the demands which are sought to be enforced are well or ill founded; and that question will not be considered upon an application for an injunction if the parties aggrieved can be fully heard in defense of the actions. Nor will the allegation that plaintiff in the injunction suit fears that he may not obtain justice in the proceeding at law, or that he should be sued in a court of higher jurisdiction, warrants a departure from the rule.<sup>35</sup>

§ 94. **Exceptions to the rule in cases of fraud.** Exceptions to the rule as above discussed and illustrated have been allowed in some cases, but it is believed that in most instances they will be found to fall under the head of fraud, or some other of the well defined heads of equity jurisdiction. Thus, an injunction has been granted to restrain defendant from proceeding to recover a debt when he has previously represented that no such indebtedness existed.<sup>36</sup> And representations and repeated declarations by a creditor that payment of a particular bonded indebtedness would never be enforced, upon the strength of which representations others have been induced to act, have been held to constitute sufficient ground for enjoining an action at law upon the bond.<sup>37</sup> So, where a bond secured by mortgage provides that the principal shall, at the option of the obligee, become due upon default in the payment

<sup>34</sup> *Commercial Bank v. Cabell*, 96 Va., 552, 32 S. E., 53.

<sup>36</sup> *Neville v. Wilkinson*, 1 Bro. C. C., 543.

<sup>35</sup> *Butchers Benevolent Association v. Cutler*, 26 La. An., 500.

<sup>37</sup> *Money v. Jordan*, 2 De Gex, M. & G., 318.

of interest for a given time, a parol waiver of such forfeiture by the obligee may afford ground for enjoining a suit upon the bond.<sup>38</sup> And where, in a proceeding to revive a judgment against an intestate, the administrator has been prevented, without fault on his own part, from pleading *plene administravit*, an injunction has been granted to restrain an action upon the administrator's bond to recover the indebtedness.<sup>39</sup> But equity will in no event restrain the exercise of a legal right of action when the person seeking relief does not show that he is aggrieved, and when it is not shown that any irreparable injury will result from permitting the law to take its course.<sup>40</sup>

<sup>38</sup> Bell v. Romaine, 3 Stew., 24.

<sup>40</sup> Lambert v. Lambert, 5 Ir. Eq.,

<sup>39</sup> Glendenning v. Ansley, 52 Ga., 339.

## III. SUITS PERTAINING TO REAL PROPERTY.

- § 95. When actions of ejectment enjoined.  
 96. When not enjoined.  
 97. Cloud upon title; stale claim; tortious possession.  
 98. Action of forcible entry and detainer not enjoined.  
 99. Suit upon bond for conveyance on failure of title; foreclosure enjoined when mortgage paid.  
 100. Suit by heirs to recover possession; confusion of boundaries.  
 101. Bill to establish legal title; suit by lessor to recover.  
 102. Proceedings under landlord and tenant act, when enjoined.

§ 95. **When actions of ejectment enjoined.** The aid of equity is frequently invoked for the purpose of enjoining actions at law pertaining to real property, especially actions of ejectment. As we have already seen, an injunction may be allowed to restrain a number of suits in ejectment against the same persons where the questions involved are identical, the relief being extended in such case for the purpose of preventing a multiplicity of suits.<sup>1</sup> Where, however, the object of the bill is not so much to prevent vexatious litigation and a multiplicity of suits as to secure a consolidation of the actions, equity will not interfere, since a court of law is equally competent to administer the relief desired.<sup>2</sup> But an action of ejectment may be enjoined on the ground that plaintiff is in equity and conscience estopped from making a claim to recover the premises; as where his conduct had been such as to warrant defendant in going on with the erection of works upon the land.<sup>3</sup> So ejectment against a corporation will be enjoined where plaintiff in the suit acted for the corporation in purchasing the land, though taking the title in his own name, since, under the principles pertaining to implied trusts, he is regarded in equity as a trustee for the company.<sup>4</sup> And

<sup>1</sup> Woods v. Monroe, 17 Mich., 238.

<sup>3</sup> Trenton Banking Co. v. McKel-

<sup>2</sup> Peters v. Prevost, 1 Paine C. way, 4 Halst. Ch., 84.  
 C., 64.

<sup>4</sup> Id.



the relief has been granted in behalf of a defendant in ejectment, claiming under a legal title of which he could not successfully avail himself in his defense at law.<sup>5</sup> But where equities are equal the court will not interfere by injunction; as where one has purchased real estate, giving a bond for the purchase money, he will not be allowed to restrain an innocent purchaser in good faith and without knowledge of complainant's equities, but the parties will be left to their remedy at law.<sup>6</sup>

§ 96. **When not enjoined.** Equity will not retain an injunction restraining an action of ejectment when it is apparent that complainants have a good defense to such action at law, and that the deed on which plaintiff relies is void.<sup>7</sup> And a preliminary injunction restraining proceedings in ejectment will be dissolved as to that portion of the property the title to which can be properly determined in the legal forum.<sup>8</sup> And it may be laid down as a general rule that equity will not restrain a person from the assertion of title to real estate, unless the case is entirely free from doubt. So where the title is being tested by an action of ejectment in a court of common law having jurisdiction, the suit will not be enjoined, since the interference in such a case would be repugnant to the clearly established principle that, where different courts have concurrent jurisdiction, the right to determine the controversy belongs to that tribunal to which resort is first had.<sup>9</sup> So an action of ejectment will not be restrained if brought by the owner of land after attaining majority, who, while an infant, had contracted for its sale and given a bond for conveyance, and after coming of age refuses to ratify the sale, even though the purchase money has been paid.<sup>10</sup> And the

<sup>5</sup> *Seager v. Cooley*, 44 Mich., 14, 5 N. W., 1058.

<sup>6</sup> *McFarlane v. Griffith*, 4 Wash. C. C., 585.

<sup>7</sup> *Morris C. & B. Co. v. Jersey City*, 1 Beas., 227.

<sup>8</sup> *Camden & A. R. Co. v. Stewart*, 3 C. E. Green, 489.

<sup>9</sup> *Stockton v. Williams*, 1 Doug. (Mich.), 546.

<sup>10</sup> *Browner v. Franklin*, 4 Gill, 463.

relief will not be granted on the ground that the action is barred by the statute of limitations, where the suit is brought by an administrator to recover land for the benefit of heirs who are not in a condition to sue, one of them being *non compos* and the other *feme covert*.<sup>11</sup> And where a single plaintiff has commenced separate ejectment suits against each of a number of different defendants, the same questions of law and fact being involved in all, equity will not entertain a bill filed by the defendants in the ejectments for the purpose of preventing a multiplicity of suits, since each defendant will be subjected to the burden of defending but a single action.<sup>12</sup> But where an injunction has been allowed against the prosecution of an action of ejectment upon the ground that the transaction out of which plaintiff derives title was a mortgage, from which defendant in ejectment seeks to redeem, if the right of redemption is established the injunction should be made perpetual; and it is error if the court does not so direct.<sup>13</sup>

§ 97. **Cloud upon title; stale claim; tortious possession.**

The owner in fee of real estate may be allowed to enjoin the prosecution of an action of ejectment by a claimant under a sheriff's deed which vests an apparently perfect title in the grantee, but whose only effect would be to cast a cloud upon the title.<sup>14</sup> But the mere staleness of a pretended claim of title, or the fact that it is barred by the statute of limitations, constitutes no sufficient ground for restraining proceedings in ejectment, since such ground may be relied upon in defense of the action at law.<sup>15</sup> And where complainant has tortiously obtained possession of premises pending an action to establish his equitable title thereto, he will not be allowed to enjoin proceedings for the recovery of the possession.<sup>16</sup>

<sup>11</sup> Fleming v. Collins, 27 Ga., 494.

<sup>13</sup> Harbison v. Houghton, 41 Ill.,

<sup>12</sup> Turner v. City of Mobile, 135

522.

Ala., 73, 33 So., 132; Winslow v.

<sup>14</sup> Sieman v. Austin, 33 Barb., 9.

Jenness, 64 Mich., 84, 30 N. W.,

<sup>15</sup> Horner v. Jobs, 2 Beas., 19.

905; Douglass v. Boardman, 113

Mich., 618, 71 N. W., 1100.

<sup>16</sup> *Ex parte* Clarke, 1 Russ. & M., 563.

**§ 98. Action of forcible entry and detainer not enjoined.**

An injunction will not be allowed against an action of forcible entry and detainer where it does not appear that a certain and manifest irreparable injury would follow the withholding of the relief. The rule rests upon the well established principle that he who invokes the aid of equity must come into court with clean hands; and in point of law one who is liable for an action of forcible entry and detainer has a taint of wrong about him, and is not, as a matter of right, entitled to the interference of a court of chancery.<sup>17</sup> Nor will the relief be granted in the absence of any allegations of fraud, mistake, accident or surprise.<sup>18</sup> And where it is sought to enjoin an action of forcible entry and detainer, but it is apparent that complainants in the injunction suit have a full and complete defense at law, equity will apply the general rule denying equitable relief where an adequate remedy exists at law, and will refuse to interfere.<sup>19</sup>

**§ 99. Suit upon bond for conveyance on failure of title; foreclosure enjoined when mortgage paid.** A suit at law upon a bond for the conveyance of real estate has been enjoined where it appeared that vendor had no title at the time of making the agreement to convey; in such case equity treats the contract as an executed one until vendee receives that for which he has contracted.<sup>20</sup> And a mortgagor who has paid his mortgage, and afterward conveyed with covenants of warranty to a third person, may properly enjoin a suit by the mortgagee who attempts to foreclose the mortgage, without

<sup>17</sup> *Crawford v. Paine*, 19 Iowa, 172; *Lamb v. Drew*, 20 Iowa, 15.

<sup>18</sup> *Lamb v. Drew*, 20 Iowa, 15.

<sup>19</sup> *Womack v. Powers*, 50 Ala., 5.

<sup>20</sup> *Dorsey v. Hobbs*, 10 Md., 412.

Although this case goes to the full extent of the principle announced in the text, yet it may well be questioned whether the rule is con-

sistent with the established principle of refusing relief in equity where ample redress can be had at law; since the want of consideration, resulting from want of title, could just as efficiently be urged in defense of the action at law as in a bill in equity.

waiting until suit upon his covenants of warranty to interpose his defense.<sup>21</sup>

§ 100. **Suit by heirs to recover possession; confusion of boundaries.** An action brought by heirs at law to recover possession of premises will not be enjoined at the instance of a devisee under a lost will which has been insufficiently proven, the proper remedy being for complainant to retrace his steps and correct his errors in the probate court where they were made.<sup>22</sup> And where an injunction is sought against an action at law on the ground of confusion of boundaries, complainant must allege the fact of such confusion in his bill, and set forth the circumstances producing it.<sup>23</sup>

§ 101. **Bill to establish legal title; suit by lessor to recover.** A bill to establish a legal title and to restrain proceedings at law will not be entertained, no equitable circumstances appearing in the case and nothing that prevents a full defense at law, complainant not even alleging that he is unable to defend at law.<sup>24</sup> Nor will an injunction be allowed against proceedings at law by a lessor to recover possession of his property demised to a lessee under a lease from year to year, on the ground that complainant has made valuable improvements which would be lost to him in case he were disposed of the property.<sup>25</sup>

§ 102. **Proceedings under landlord and tenant act, when enjoined.** When the title to real property is being determined in a case already pending in a court of equity powers, the court may enjoin one of the parties to the cause from proceeding before a justice of the peace to recover possession of the premises in controversy under the landlord and tenant act of the state, the relief being granted in such case upon the ground of prevention of a multiplicity of suits.<sup>26</sup>

<sup>21</sup> Hubbard v. Jasinski, 46 Ill., 160.

<sup>22</sup> Clarke v. Clarke, 7 R. I., 45.

<sup>23</sup> Foster, *Ex parte*, 11 Ark., 304.

<sup>24</sup> De Groot v. Receivers, 2 Green Ch., 198.

<sup>25</sup> West v. Flannagan, 4 Md., 36.

<sup>26</sup> Damschroeder v. Thias, 51 Mo., 100.

## IV. SUITS IN FOREIGN COURTS.

§ 103. The English rule; foreign courts not enjoined, but **only the parties.**

104. Illustrations of the rule.

105. Court may enjoin parties within its jurisdiction, although the property is abroad; English rule.

106. American rule.

107. Equity declines to interfere when foreign tribunal may do more complete justice.

§ 103. **The English rule; foreign courts not enjoined, but only the parties.** The jurisdiction of courts of equity to restrain proceedings in the courts of a foreign country has been the subject of much contention, resulting in not a little conflict of authority. The jurisdiction of the English Court of Chancery thus to interfere with the proceedings of foreign courts, although formerly denied,<sup>1</sup> may now be regarded as definitely settled and clearly established. In the exercise of this jurisdiction the court does not assume to control or interfere with the courts of the foreign country, since any such assumed control would be manifestly inconsistent with the plainest principles of national sovereignty and equality. It rather proceeds upon the undoubted authority which it possesses over persons within its territorial limits and under its jurisdiction to restrain them from using the tribunals of a foreign state in such a manner as is contrary to equity and good conscience. When, therefore, the parties to a suit in a foreign country reside within the jurisdiction of the English Court of Chancery, it may in a proper case act *in personam* upon these parties, and prohibit them from proceeding further with the suit. The proceedings are regarded as purely *in personam*, the mandate of the court being directed to the parties and not to the tribunal in which the action is pending.<sup>2</sup>

<sup>1</sup> *Lowe v. Baker*, Free. Chy., 125;      <sup>2</sup> *Cranstown v. Johnston*, 3 Ves., S. C., *sub nom.* *Love v. Baker*, 182, 5 Ves., 277; *Bunbury v. Bunbury*, 3 Jur., 648, affirming S. C.,



§ 104. **Illustrations of the rule.** In accordance with these principles the indorsee of a bill of exchange has been restrained in England from bringing suit upon the bill of exchange in the courts of Ireland, upon grounds which would have warranted the relief against such suit in the English

1 Beav., 313; Carron, etc. v. Mac-laren, 5 H. L. Cases, 416; Beckford v. Kemble, 1 Sim. & Stu., 7; Harrison v. Gurney, 2 Jac. & W., 563; Bowles v. Orr, 1 Y. & C., 464; *In re* Belfast Shipowners Co., (1894) 1 L. R. Ir., 321; Portarlington v. Soulby, 3 Myl. & K., 104. In the latter case the history of the jurisdiction and the principles upon which it is based are very clearly laid down by Lord Chancellor Brougham, as follows: "Soon after the Restoration, and when this, like every other branch of the court's jurisdiction, was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors—the Nottinghams and Macclesfields, the parents of equity—the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of *Lowe v. Baker*, 2 Freem., 125; 1 Ch. Cas., 67. In *Lowe v. Baker* it appears that one only of several parties who had begun proceedings in the court of Leghorn was resident within the jurisdiction there, and the court allowed the *subpoena* to be served on him, and that this should be good service on the rest. So far there seems to have been very

little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain these proceedings at Leghorn, after advising with the other judges. But the report adds: '*Sed quære*, for all the bar was of another opinion;' and it is said that, when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given that the injunction was not directed to the foreign court, but to the party within the jurisdiction here—a very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding. Accordingly, this case of *Lowe v. Baker* has not been recognized or followed in later times. Two instances are mentioned in Mr. Hargrave's collection of the jurisdiction being recognized; and in the case of *Wharton v. May*, 5 Ves., 71. See also *Kennedy v. Earl of Cassillis*, 2 Swanst., 313; *Bushby v. Munday*, 5 Madd. R., 297; *Harrison v. Gurney*, 2 J. & W., 563. In *Beauchamp v. Marquis of Huntley*, Jac., 546, which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment or

courts.<sup>3</sup> So a creditor who has availed himself of a decree in England to procure relief against the assets of an estate there was enjoined from proceeding with a suit against the same estate in Ireland.<sup>4</sup> And the same principle has been recognized by the Irish Court of Chancery; and where suits were instituted in that and the English Court of Chancery concerning the same subject-matter, the plaintiff in the English suit was enjoined in Ireland from further prosecuting the suit in England without permission of the master of the rolls there, to be obtained upon notice to the plaintiff in the Irish suit.<sup>5</sup>

carrying on any action in what is called the court of great session in Scotland—meaning, of course, the court of session. I have directed a search to be made for precedents, in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of *Campbell v. Houl-ditch*, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which had commenced before the court of session in Scotland. From the note which his lordship himself wrote upon the petition requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority. In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of

the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in *Penn v. Lord Baltimore*, 1 Ves. Sen., 444, it can decree the performance of an agreement touching the boundary of a province in North America; or, as in the case of *Tellor v. Carteret*, 2 Vern., 449, can foreclose a mortgage in the Isle of Sark, one of the channel islands,—in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance, or other act *in pais*, or the instituting or prosecution of an action in a foreign court."

<sup>3</sup> *Portarlington v. Soulby*, 3 Myl. & K., 104.

<sup>4</sup> *Beauchamp v. Marquis of Huntley*, Jac., 546.

<sup>5</sup> *Parnell v. Parnell*, 7 Ir. Ch., 322.

§ 105. **Court may enjoin parties within its jurisdiction, although the property is abroad; English rule.** The fact that the property which is the subject-matter of the controversy is located in a foreign country will not prevent the court from exercising the jurisdiction where all the parties to the transaction are within its reach and amenable to its process. And if it be made to appear that the matters in controversy can be more expeditiously adjusted and the ends of justice better attained in the jurisdiction where the parties then are, proceedings in the courts of the foreign country will be enjoined.<sup>6</sup> And where parties have proceeded in equity as far as a decree, and pending the settlement of accounts thereunder by a master in chancery proceedings are instituted in respect to the same matter in another country, an injunction may be allowed.<sup>7</sup> So where all the parties are within the jurisdiction of the court of equity, and it has on a bill to redeem under a mortgage decreed an inquiry as to the amount due, it may restrain proceedings for the foreclosure of the mortgage in the courts of another country on such terms as it thinks proper.<sup>8</sup> If, however, upon balancing the convenience and inconvenience likely to result to the different parties, it appears that the questions involved can be more conveniently litigated in the foreign court, an injunction will be refused.<sup>9</sup>

§ 106. **American rule.** While in this country the aid of equity is rarely if ever invoked to restrain proceedings in the courts of foreign nations, yet the same principles are held applicable to the case of enjoining citizens of one state from proceedings at law in the courts of a sister state. And while there is a lack of uniformity, amounting even to a conflict of authority, in the decided cases, the English rule seems to

<sup>6</sup> *Bunbury v. Bunbury*, 1 Beav., 318, affirmed 3 Jur., 648; *Beckford v. Kemble*, 1 Sim. & Stu., 7.

*v. Kemble*, 1 Sim. & Stu., 7.

<sup>8</sup> *Beckford v. Kemble*, 1 Sim. & Stu., 7.

<sup>9</sup> *Jones v. Geddes*, 1 Ph., 724.

<sup>7</sup> *Wedderburn v. Wedderburn*, 2 Beav., 208.

have the support of the clear weight of authority; and the courts of one state will, in a proper case, enjoin persons within their jurisdiction from instituting legal proceedings in other states, or from further proceedings in actions already begun.<sup>10</sup> As we have seen in a preceding section, a distinc-

<sup>10</sup> *Cole v. Cunningham*, 133 U. S., 107, 10 Sup. Ct. Rep., 269; *Dehon v. Foster*, 4 Allen, 545; *Bank of B. Falls v. Rutland*, 28 Vt., 470; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 46 Vt., 792; *Hazen v. Lyndonville Bank*, 70 Vt., 543, 41 Atl., 1046, 67 Am. St. Rep., 680; *Hays v. Ward*, 4 Johns. Ch., 123; *Vail v. Knapp*, 49 Barb., 299; *Keyser v. Rice*, 47 Md., 203; *Miller v. Gittings*, 85 Md., 601, 37 Atl., 372, 37 L. R. A., 654, 63 Am. St. Rep., 52; *Snook v. Snetzer*, 25 Ohio St., 516; *Hawkins v. Ireland*, 64 Minn., 339, 67 N. W., 73, 58 Am. St. Rep., 534; *Moton v. Hull*, 77 Tex., 80, 13 S. W., 849, 8 L. R. A., 722. And see, upon the general subject of the powers of equity to control the action of persons within its jurisdiction with reference to matters beyond its jurisdiction, *Mitchell v. Bunch*, 2 Paige, 606; *Masie v. Watts*, 6 Cranch, 148. But see, *contra*, *Burgess v. Smith*, 2 Barb. Ch. R., 276; *Williams v. Ayrault*, 31 Barb., 364; *Carroll v. Farmers & Mechanics Bank, Harring. (Mich.)*, 197. Even the courts of New York, which have contended most strenuously against the rule, are by no means inflexible in denying the relief; and the injunction was allowed in *Hays v. Ward*, 4 Johns. Ch., 123, and in *Vail v. Knapp*, 49 Barb., 299, *supra*. And in *Mead v. Merritt*, 2

*Paige*, 402, the jurisdiction of equity is recognized to restrain citizens of one state from beginning suits in a sister state, though denied as to suits already begun. The strongest reason which can be urged against the exercise of this jurisdiction is that assigned in denying the injunction in *Carroll v. Farmers & Mechanics Bank, Harring. (Mich.)*, 197, that, if courts of one state should see fit to enjoin proceedings in another, that other might retaliate in like manner by enjoining proceedings in the first, and thus give rise to an endless conflict of jurisdiction. Even this reasoning loses its force when it is remembered that the injunction is not directed to the court of the foreign state, but simply to the parties litigant, the proceeding being purely *in personam*. In *First National Bank v. La Due* 39 Minn., 415, 40 N. W., 367, where it was sought to enjoin the prosecution of an attachment against complainant, a national bank, and against its property located in a foreign state, the court held that, since it was impossible for the foreign court to acquire jurisdiction either over the person of complainant because of the impossibility of service of process, or over its property because of the inhibition of a federal statute which prohibited attachments against

tion is drawn between a court of equity interfering with the action of the courts of a foreign state, and restraining persons within its own jurisdiction from using foreign tribunals as instruments of wrong and oppression. While, therefore, the court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process from instituting or carrying on suits in other states which will result in injury and fraud.<sup>11</sup> Thus, where a creditor and

national banks or their property before final judgment, the injunction was unnecessary for the protection of complainant's rights and was therefore properly denied.

<sup>11</sup> *Dehon v. Foster*, 4 Allen, 545; *Vail v. Knapp*, 49 Barb., 299; *Keyser v. Rice*, 47 Md., 203; *Miller v. Gittings*, 85 Md., 601, 37 Atl., 372, 37 L. R. A., 654, 63 Am. St. Rep., 52; *Snook v. Snetzer*, 25 Ohio St., 516; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 46 Vt., 792; *Hazen v. Lyndonville Bank*, 70 Vt., 543, 41 Atl., 1046, 67 Am. St. Rep., 680; *Hawkins v. Ireland*, 64 Minn., 339, 67 N. W., 73, 58 Am. St. Rep., 534; *Moton v. Hull*, 77 Tex., 80, 13 S. W., 849, 8 L. R. A., 722; *Great Falls, etc. v. Worcester*, 23 N. H., 470. In this case *Gilchrist, C. J.*, says: "It would be a great defect in the administration of the law if the mere fact that the property was out of the state could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this state, by going out of the jurisdiction and committing a wrong, as by staying here and doing it; . . . as the legislature has

conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here has been recognized for nearly two hundred years, we have no hesitation in holding that the court has jurisdiction." In a leading American case upon this subject the court say: "The authority of this court as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this state and of other states or foreign countries, is clear and indisputable. In the exercise of this power courts of equity proceed not upon any claim of right to interfere with or control the course of proceedings in other tribunals; . . . the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process to restrain



debtor are both citizens of and residents in the same state, and the creditor institutes an action of attachment and garnishee proceedings in another state to reach credits due to the debtor there, and which would have been exempt from attachment or legal process under the laws of the state where both parties are domiciled, the creditor may be enjoined from further prosecuting his action in the foreign state, it being regarded as an effort to evade the laws of the state of his domicile.<sup>12</sup> So, also, the relief will be granted under such circumstances where the defendant has commenced an attach-

them from doing acts which will work wrong and injury to others. . . . As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting and carrying on proceedings in a court in this state, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court." Per Bigelow, C. J., *Dehon v. Foster*, 4 Allen, 545. In *Vail v. Knapp*, 49 Barb., 299, it is said: "While, as a general rule, the propriety of which is apparent, the courts of this state decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state, yet there are exceptions to this rule; and when a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct

of a party within its jurisdiction to prevent oppression or fraud. No rule of comity forbids it. . . . In granting the injunction we deal with parties residing in this state, and do not seek to interfere with or attempt to control the action of the court in Vermont in which the action is pending. We command our own citizens, not the courts or parties residing in Vermont." In *Monumental Savings Assn. v. Fentress*, 125 Fed., 812, where a suit was pending in the United States Circuit Court to cancel plaintiff's subscription to corporate bonds, an injunction was granted to restrain the prosecution of an action at law subsequently instituted against the plaintiff in the United States Circuit Court of another circuit for the recovery of the amount of the subscription.

<sup>12</sup> *Keyser v. Rice*, 47 Md., 203; *Snook v. Snetzer*, 25 Ohio St. 516; *Teager v. Landsley*, 69 Ia., 725, 27 N. W., 739; *Hager v. Adams*, 70 Ia., 746, 30 N. W., 36; *Griggs v. Docter*, 89 Wis., 161, 61 N. W., 761, 30 L. R. A., 360, 46 Am. St. Rep., 824; *Moton v. Hull*, 77 Tex., 80, 13 S. W., 849, 8 L. R. A., 722.

ment suit in a foreign state for the purpose of gaining a preference over complainant which would be illegal under the laws of the state of their domicile.<sup>13</sup> So, where the plaintiff and defendant are residents of the same state, the latter may be enjoined by the courts of that state from prosecuting actions against complainant in the courts of another state for the purpose of evading the laws of the state of their domicile and depriving the complainant of his constitutional immunity against imprisonment for debt.<sup>14</sup> But the relief in such cases is predicated upon the fact that the plaintiff and defendant are both citizens and residents of the same state and that the latter is seeking to evade the laws of that state by resorting to the courts of another, thereby perpetrating a fraud upon the plaintiff. And where the creditor in an attachment is a resident of the state in which the attachment is brought, the debtor, proceeding in the courts of his own state, can not enjoin such attachment upon the ground that the property is exempt under the laws of that state.<sup>15</sup>

§ 107. **Equity declines to interfere when foreign tribunal may do more complete justice.** While the English doctrine, as stated in preceding sections, is well established and is generally recognized, courts of equity may properly refuse to interfere with the action of persons litigating in other states if it is apparent that full and complete justice may be done to all parties in the litigation already pending in the sister state. Where, therefore, a suit is already pending in one state concerning real property within its jurisdiction, and the court in which such suit is pending may render full relief by such a

<sup>13</sup> *Hazen v. Lyndonville Bank*, 49 La. An., 459, 21 So., 70 Vt., 543, 41 Atl., 1046, 67 Am. St. Rep., 680; *Hayden v. Yale*, 45 La.

An., 362, 12 So., 633. This was an action to recover the proceeds of the sale of the attached property.

But see *Commercial Soap Works v. Lambert*, 49 La. An., 459, 21 So., 639.

<sup>14</sup> *Miller v. Gittings*, 85 Md., 601, 37 Atl., 372, 37 L. R. A., 654, 63 Am. St. Rep., 52.

<sup>15</sup> *Griffith v. Langsdale*, 53 Ark., 71, 13 S. W., 733, 22 Am. St. Rep., 182.

decree as will finally determine the controversy, a court of equity in another state, being unable by reason of want of jurisdiction over the real estate and over some of the parties to the cause to afford full relief, will refuse to restrain the proceedings.<sup>16</sup> And upon similar principles an injunction will not be granted to restrain creditors having a mortgage upon property in a foreign country from proceeding with a litigation in that country to obtain a decision of the courts there touching the disposition of the mortgaged property. In such a case it will be presumed that the courts of the foreign country are better advised as to their own laws, and equity will therefore decline to interfere, especially when the foreign court has first obtained jurisdiction of the matter.<sup>17</sup> So equity will refuse to interfere with the prosecution of a foreclosure in a sister state upon the alleged ground that the view of the law governing the rights of the parties which would be taken by the supreme court of that state differs from the view of the Supreme Court of the United States or of the state where the relief is sought, the presumption being that the court of the state where the suit is pending will decide according to law and right.<sup>18</sup> And the English Court of Chancery refused to restrain a creditor of a bankrupt in England, who had not proven his demand in bankruptcy or taken any proceedings therein, from prosecuting a suit against the bankrupt in Scotland for the enforcement of his demand out of real property of the bankrupt there situated.<sup>19</sup> And before a court of equity will interfere upon an interlocutory motion to enjoin the prosecution of a suit by reason of a decree or judgment in a foreign country upon the same subject-matter, it should be well satisfied that the foreign decree does complete justice between the parties and covers the entire controversy.<sup>20</sup>

<sup>16</sup> *Harris v. Pullman*, 84 Ill., 20. 14 Am. St. Rep., 397.

<sup>17</sup> *Moor v. Anglo-Italian Bank*, 10 Ch. D., 681. <sup>19</sup> *Pennell v. Roy*, 3 De G., M. & G., 126.

<sup>18</sup> *Carson v. Dunham*, 149 Mass., 52, 20 N. E., 312. <sup>20</sup> *Ostell v. Le Page*, 2 De G., M. & G., 892. 3 L. R. A., 203.

## V. STATE AND FEDERAL COURTS.

- § 108. The question discussed upon principle.
109. Federal courts restricted by legislation from enjoining proceedings in state courts.
110. Exceptions to the rule as to federal courts; injunction in aid of removal.
111. When state courts may enjoin proceedings in United States courts.

§ 108. **The question discussed upon principle.** Questions of much nicety and of not a little difficulty have frequently arisen touching the relative powers of the state and federal courts, and of the jurisdiction of the one to interfere by the extraordinary aid of an injunction with the action of parties litigant in the other tribunal. The jurisdiction of these courts, although deriving their powers from two separate and distinct sovereignties, is nevertheless co-ordinate in many of the matters which give rise to litigation in either forum, and the consequent danger of conflict between the two systems lends to this branch of the jurisdiction of equity additional importance. Independent of legislation or of judicial authority, it is difficult to perceive any satisfactory reason why the same principles should not apply in determining whether a court of equity, state or federal, should restrain the action of parties litigant in the courts of the other sovereignty as are applicable between courts of the same state or sovereignty. The jurisdiction in this class of cases being, as already shown, purely *in personam*, and the court which grants the injunction in no manner attempting to interfere with or control the action of the court whose suitors are enjoined, it would seem, upon principle, to be competent for a court of equity, state or federal, to restrain parties who are within its jurisdiction and amenable to its process from using the machinery of the other court for purposes of fraud, hardship or oppression. The authority of the decided cases does not, however, support the views here suggested; and, as will be hereafter

shown, the courts have usually confined themselves in the granting of injunctions against proceedings in the other tribunal, state or federal, to cases where such relief was necessary to protect the prior jurisdiction of the court first acquiring control of the parties and of the subject-matter.

§ 109. **Federal courts restricted by legislation from enjoining proceedings in state courts.** The power of the federal courts to interfere by injunction with actions pending in the state courts was, at an early period in the history of the nation, limited and defined by legislation. The judiciary act of 1793<sup>1</sup> prohibited in express terms the granting of injunctions to stay proceedings in any court of a state. This prohibition has been embodied in the Revised Statutes of the United States in the following provision: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."<sup>2</sup> Except in cases arising under the bankrupt laws of the United States, where the paramount jurisdiction of the federal courts has been frequently protected and enforced by enjoining proceedings against the estate of a bankrupt in the state courts, the courts of the United States have generally submitted to the limitation thus prescribed by Congress, and have ordinarily refused to interfere by injunction with the action of parties litigant in the state courts.<sup>3</sup> And the prohibition contained in the judiciary act

<sup>1</sup> Act of Congress, approved March 2, 1793, ch. 22, § 5, 1 U. S. Statutes at Large, 334, 335.

<sup>2</sup> Revised Statutes U. S., § 720; 1 U. S. Comp. Stat. 1901, p. 581. As to whether this provision is applicable to the courts of the District of Columbia, thereby prohibiting them from enjoining proceedings in state courts, see Keane v. Chamberlain, 14 App. D. C., 84.

<sup>3</sup> Diggs v. Wolcott, 4 Cranch, 179; Chaffin v. City of St. Louis, 4 Dill., 19; Moore v. Holliday, 4 Dill., 52; Freeney v. First National Bank, 3 McCrary, 622; United States v. Parkhurst-Davis Mercantile Co., 176 U. S., 317, 20 Sup. Ct. Rep., 423; Gates v. Bucki, 4 C. C. A., 116, 53 Fed., 961; Rensselaer & S. R. Co. v. Bennington & R. R. Co., 18 Fed. 617.



of 1793, being regarded as extending to all cases except where otherwise provided by the bankrupt laws of the United States, the federal courts have refused to enjoin the prosecution in the state courts of suits concerning the settlement of the estates of decedents, brought by persons claiming interests therein.<sup>4</sup> And this prohibition is held to be applicable to probate proceedings in the administration of the estate of a deceased person, and a federal court therefore has no authority, upon a bill filed by the executor and a legatee under the will of a decedent, probated in a foreign state, to enjoin an administrator appointed by a state court from distributing personalty among the heirs at law contrary to the provisions of the will.<sup>5</sup> And a petition for a receiver in aid of a judgment rendered in a state court falls within the provision of § 720 and a federal court is therefore without jurisdiction to enjoin such a proceeding.<sup>6</sup> So a federal court has no jurisdiction to restrain a police officer from serving warrants of arrest issued by a state court for the violation of municipal ordinances which are alleged to be repugnant to the constitution of the United States.<sup>7</sup> And the circuit courts of the United States have no jurisdiction to interfere by injunction with the possession or control of property which is in possession of a state court having jurisdiction over the matter.<sup>8</sup> Nor have these courts power to enjoin the execution of a judgment of a state court upon the ground that it has been superseded by a writ of error from the Supreme Court of the United States, or to restrain state officials or others from disregarding such *supersedeas*.<sup>9</sup>

<sup>4</sup> Haines v. Carpenter, 1 Otto, 254; Dial v. Reynolds, 6 Otto, 340.

<sup>5</sup> Whitney v. Wilder, 4 C. C. A., 510, 54 Fed., 554.

<sup>6</sup> Mutual Reserve F. L. Assn. v. Phelps, 190 U. S., 147, 23 Sup. Ct. Rep., 707, affirming S. C., 50 C. C. A., 339, 112 Fed., 453.

<sup>7</sup> Yick Wo v. Crowley, 26 Fed., 207.

<sup>8</sup> Hutchinson v. Green, 2 McCrary, 471; S. C., 6 Fed., 833; Domestic & F. M. Society v. Hinman, 13 Fed., 161.

<sup>9</sup> Murray v. Overstolz, 1 McCrary, 606; S. C., 8 Fed., 110.

§ 110. **Exceptions to the rule as to federal courts; injunction in aid of removal.** It is to be observed, however, that the restriction thus imposed upon the federal courts by the judiciary act of 1793 is construed as limited to actions begun in the state courts before proceedings are instituted in the federal courts, and is not applicable where the jurisdiction of the federal courts has first attached.<sup>10</sup> And the test as to the priority of jurisdiction would seem to be not the date of commencing the suit but of acquiring jurisdiction of the defendant by personal service of process.<sup>11</sup> And the federal courts being empowered to issue all writs which may be necessary for the exercise of their respective jurisdictions,<sup>12</sup> it is held that when they have acquired jurisdiction over a corporation in an action to compel it to respond to plaintiff for a pecuniary demand, they may enjoin the corporation from taking steps in a state court to procure its dissolution.<sup>13</sup> So a federal court, having first acquired jurisdiction, may enjoin the attorney-general of a state from instituting in the courts of the state proceedings for the collection of a penalty imposed by an alleged unconstitutional law of the state.<sup>14</sup> So where a cause

<sup>10</sup> *French v. Hay*, 22 Wal., 250; *Julian v. Central Trust Co.*, 193 U. S., 93, 24 Sup. Ct. Rep., 399, affirming S. C., 53 C. C. A., 438, 115 Fed., 956; *Fisk v. Union Pacific R. Co.*, 10 Blatch., 518; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A., 503, 54 Fed., 547; *Garner v. Second National Bank*, 16 C. C. A., 86, 67 Fed., 833; *Iron Mountain R. Co. v. City of Memphis*, 37 C. C. A., 410, 96 Fed., 113; *Sharon v. Terry*, 36 Fed., 337; *Wadley v. Blount*, 65 Fed., 667; *Lanning v. Osborne*, 79 Fed., 657; *Starr v. Chicago, R. I. & P. R. Co.*, 110 Fed., 3; *Stewart v. Wisconsin Central R. Co.*, 117 Fed., 782; *Union Life Ins. Co. v. Riggs*, 123 Fed., 312. As to the

power of the federal courts, which have first acquired jurisdiction of the parties and of the subject-matter by prior service of process, to restrain the parties from proceeding as to the same subject-matter in the state courts, see *Union M. L. I. Co. v. University of Chicago*, 10 Biss., 191.

<sup>11</sup> *Pitt v. Rogers*, 43 C. C. A., 600, 104 Fed., 387.

<sup>12</sup> Act of Congress of September 24, 1789, 1 U. S. Statutes, 81, 82, Revised Statutes U. S., § 716; 1 U. S. Comp. Stat. 1901, p. 580.

<sup>13</sup> *Fisk v. Union Pacific R. Co.*, 10 Blatch., 518.

<sup>14</sup> *Starr v. Chicago, R. I. & P. R. Co.*, 110 Fed., 3. In the proceed-

is properly removed from a state to a federal court under the removal acts, and the latter annuls and vacates a decree previously rendered in the state court and dismisses the cause for want of equity, the court may properly enjoin the complainant who has brought suit upon such decree in another state from proceeding to enforce the decree by such action. In such a case—the court having jurisdiction *in personam* over the parties, and having control over the cause—it will not permit its jurisdiction to be trenched upon by any other tribunal, and may properly enjoin a party to the cause from proceeding beyond the territorial jurisdiction of the court.<sup>15</sup> So where plaintiff in a replevin suit brought in a state court properly removes it to the federal court, and there obtains judgment in his favor, but the state court proceeds to try the cause and renders judgment against the plaintiff, and an action is then brought in the state court upon the replevin bond, the federal court may enjoin the prosecution of such action, the relief being merely ancillary to its jurisdiction already acquired, and necessary to give proper effect to its own judgment.<sup>16</sup> And when a cause instituted in a state court has been properly removed to the federal court and is there

ing which was enjoined by the decree of the federal court in this case, the Supreme Court of Nebraska refused to recognize the jurisdiction of the United States court to grant the injunction. Their decision, however, is not based upon the inhibition of § 720 but upon the ground that such a proceeding was a suit against a state within the meaning of the 11th Constitutional Amendment. *State v. Chicago, R. I. & P. R. Co.*, 61 Neb., 545, 85 N. W., 556; *Same v. Same*, 62 Neb., 123, 87 N. W., 188.

<sup>15</sup> *French v. Hay*, 22 Wal., 250.

<sup>16</sup> *Dietzch v. Huidekoper*, 103 U. S., 494. In *Terre Haute & I. R.*

*Co. v. Peoria & P. U. R. Co.*, 82 Fed., 943, instead of removing the cause to the federal court and then filing a bill for an injunction ancillary to the suit at law, an original bill was filed in the federal court seeking to restrain the action at law in the state court. The proper practice, however, as suggested in the text, undoubtedly is to remove the cause to the federal court and then to file an injunction bill as ancillary thereto. By so doing, legal rights remain for their determination in a legal forum and the right of trial by jury is preserved.

proceeding to judgment, defendant may, by bill filed in the federal court ancillary to the main action, restrain the plaintiff from the further prosecution of the suit in the state court.<sup>17</sup> So, too, the United States courts may restrain a state officer from such proceedings under a statute of a state as would destroy a franchise created by the United States.<sup>18</sup> So, in a proper case, they may enjoin proceedings in their own forum until the determination of the same subject-matter in a suit between the parties in a state court.<sup>19</sup> A further exception has been recognized to the provision of § 720 in the case of a petition filed by a ship-owner in the United States district court of admiralty for the limitation of his liability. In such a case the admiralty court may properly enjoin the prosecution in a state court of an action previously commenced against the ship-owner for the purpose of enforcing his personal liability.<sup>20</sup>

§ 111. **When state courts may enjoin proceedings in United States courts.** As regards the power of the state courts to interfere by injunction with the action of suitors in the courts of the United States, while no satisfactory reason can be perceived why they should not be governed by the same principles which apply in administering relief by injunction against vexatious or unwarranted litigation in courts of the same or of a foreign state, they have nevertheless generally refused to interfere by injunction to restrain actions in the federal tribunals.<sup>21</sup> Indeed, the doctrine has been broadly

<sup>17</sup> *Madisonville Traction Co. v. 332*, an injunction was refused in *St. Bernard M. Co.*, 196 U. S., 239, 25 Sup. Ct. Rep., 251; *Baltimore & O. R. Co. v. Ford*, 35 Fed., 170; *Abeel v. Culberson*, 56 Fed., 329.

*Contra*, *Coker v. Monaghan Mills*, 110 Fed., 803; *Missouri, K. & T. R. Co. v. Scott*, 4 Woods, 170; S. C., 13 Fed., 793, where it is held that the federal courts are powerless to interfere in such cases. And in *Penrose v. Penrose*, 17 Blatch.,

<sup>18</sup> *Osborn v. United States Bank*, 9 Wheat., 738; *State Lotter Co. v. Fitzpatrick*, 3 Woods, 222.

<sup>19</sup> *City Bank v. Skelton*, 2 Blatch., 14; S. C., *Ib.*, 26.

<sup>20</sup> *In re Whitelaw*, 71 Fed., 733.

<sup>21</sup> *Schuyler v. Pelissier*, 3 Ed. Ch., 191; *Coster v. Griswold*, 4 Ed.

asserted that the state courts are wholly destitute of any power or authority for such interference.<sup>22</sup> The better doctrine, however, undoubtedly is that the state courts may, for the purpose of protecting their jurisdiction when it has first attached over the controversy, enjoin parties who are amenable to their process and subject to their jurisdiction from afterward litigating the same subject in the federal courts.<sup>23</sup> Thus, when a state court has first acquired jurisdiction of the subject-matter and of the parties, it may enjoin the prosecution of a subsequent suit by the defendant concerning the same subject-matter in a federal court in another state.<sup>24</sup> So, if complainant, having begun his equitable action in a state court, afterward sues at law concerning the same subject-matter in a United States court, and defendant has a whole or partial defense, of which he can not avail in the

Ch., 364; *Phelan v. Smith*, 8 Cal., 520.

<sup>22</sup> *Phelan v. Smith*, 8 Cal., 520; *Riggs v. Johnson Co.*, 6 Wal., 166. And in the opinion of Mr. Justice Clifford in *United States v. Keokuk*, 6 Wal., 514, it is said that: "Orders for an injunction are as inoperative upon the process of the circuit court (of the United States) for that district as they would be if directed to the process of a circuit court in any other district of the United States, because the state and federal courts in their sphere of action are independent of any such control." While the doctrine as thus stated is undoubtedly true as regards any effort on the part of a state or federal court to operate by injunction upon the process of any other tribunal, state or national, it should be borne in mind that courts of equity, in the exercise of their

extraordinary powers by injunction, have never assumed to enjoin the court itself, but only to arrest the action of the parties litigant; and this in the exercise of a jurisdiction strictly *in personam*. In *Holstein v. County Board*, 64 S. C., 374, 42 S. E., 180, it was held that where the United States court had sustained the validity of a statute authorizing the issuing by a municipal corporation of railway-aid bonds, a state court, being bound to give full faith and credit to the judgment of the federal court, could not enjoin the issuing of bonds by the municipality for the purpose of paying a balance due upon such railway-aid bonds.

<sup>23</sup> *Akerly v. Vilas*, 15 Wis., 401; *Home Insurance Co. v. Howell*, 9 C. E. Green, 238.

<sup>24</sup> *Home Insurance Co. v. Howell*, 9 C. E. Green, 238.



action at law, complainant may be enjoined from proceeding in the federal court.<sup>25</sup> And where a state court has properly acquired jurisdiction over an action for the recovery of damages against a ship-owner *in personam* for the loss of goods, and a federal court afterward entertains proceedings in admiralty against the vessel by which the goods were lost, and enjoins plaintiffs in the action in the state court from further proceedings, plaintiffs will still be allowed by the state court to proceed with their action in that tribunal, and it will refuse to enjoin them from so proceeding.<sup>26</sup> But while a state court may, in a proper case, restrain defendants within its jurisdiction from proceeding at law for the recovery of real property within the state, yet as to defendants not served with process and residing in other states it will not enjoin them from suing in the federal courts.<sup>27</sup>

<sup>25</sup> *Akerly v. Vilas*, 15 Wis., 401.

<sup>27</sup> *Worthington v. Lee*, 61 Md.,

<sup>26</sup> *Knowlton v. Providence & N.* 530.

*Y. S. Co.*, 53 N. Y., 76.

## CHAPTER III.

### OF INJUNCTIONS AGAINST JUDGMENTS.

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#### I. GENERAL FEATURES OF THE JURISDICTION.

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§ 112. **History of the jurisdiction.** The jurisdiction of equity to stay proceedings at law after judgment recovered is of ancient origin, and although now established beyond dispute it was formerly the cause of frequent and violent contests between the chancellors and common law judges. It was insisted by the latter that after verdict equity was powerless to enjoin the proceedings, and that the Court of King's Bench would not permit a judgment creditor to be enjoined from following up his judgment at law. The jurisdiction may be distinctly traced to the beginning of the reign of Edward the Fourth, and its assertion constituted one of the articles of impeachment against Cardinal Wolsey during the reign of Henry the Eighth. It was not definitely established, however, until the reign of James the First, when a violent contest arose between Lord Ellesmere, who then held the Great Seal, in favor of the jurisdiction, and Lord Chief Justice Coke against it. A reference was had to five of the most eminent lawyers of that time, who reported a series of precedents in favor of the right to interfere, and that there were cases of its exercise even after execution. The report being confirmed by the King, an end was had to the discussions that had so long prevailed, and the jurisdiction has never since been questioned.<sup>1</sup>

<sup>1</sup> Woodes., Lect. 6, p. 186; 3 *Ib.*, although the growing encroachments of the chancellors in this direction were stoutly resisted by the common law judges. In Michaelmas term, Edward IV., A. D., 1483, Lord Chancellor Thomas Rother-

§ 113. **Not a favorite jurisdiction.** The jurisdiction, although well established, is not regarded as a favorite one with courts of equity. A bill seeking relief of this nature is scrutinized with great jealousy, and the grounds upon which the interference will be allowed are confessedly somewhat narrow and restricted. It will not suffice to show that injustice has been done by the judgment against which relief is sought, but it must also appear that this result was not caused by any inattention or negligence on the part of the person aggrieved; and he must show a clear case of diligence to entitle himself to an injunction.<sup>2</sup> The object of the injunction

am had granted an injunction after verdict to restrain the plaintiff from proceeding to judgment in the King's Bench. The verdict in question having been rendered at *nisi prius*, the matter came on before the King's Bench in bank, when Hussey, C. J., asked counsel for plaintiff if they wished to pray judgment according to the verdict; to which they replied that they were doubtful of violating the injunction—otherwise they would pray judgment. Fairfax, J.: "Notwithstanding the injunction, judgment might be prayed, for if the injunction was against the plaintiff, still his attorney might pray his judgment, or *e contra*." Hussey, C. J., announced that they had communed over the matter and saw no difficulty that would come to the party if he prayed judgment, since the penalty mentioned in the injunction could not be levied at law; and there was nothing left but imprisonment in the Fleet; and if the chancellor should commit a man to the Fleet, "we will grant a *habeas corpus*,

returnable before us; and when it is returned before us, we will discharge him," adding that they would do all they could to assist him. Fairfax, J., said that they would go to the chancellor and ask him to dissolve the injunction. But they added that, if the chancellor would not dissolve the injunction, notwithstanding it, they would grant judgment if the party prayed it.

<sup>2</sup> Robuck *v.* Harkins, 38 Ga., 174; Slack *v.* Wood, 9 Grat., 40; Bateman *v.* Willoe, 1 Sch. & Lef., 201; Telford *v.* Brinkerhoff, 163 Ill., 439, 45 N. E., 156; Phillips *v.* Pullen, 45 N. J. Eq., 5, 16 Atl., 9; Brick *v.* Burr, 47 N. J. Lq., 189, 19 Atl., 842; Spokane Coop. M. Co. *v.* Pearson, 28 Wash., 118, 68 Pac., 165. See also Boley *v.* Griswold, 2 Mont., 447; Stilwell *v.* Carpenter, 59 N. Y., 414, reversing S. C., 1 Thomp. & C., 615; Cairo & F. R. Co. *v.* Titus, 12 C. E. Green, 102; Morris *v.* Edwards, 62 Tex., 205. The general principle upon which the relief is founded is well stated by Lord Redesdale in Bateman *v.*



is to prevent the person against whom it issues from availing himself of an unfair advantage, resulting from fraud, accident, mistake or otherwise, the enforcement of which is against conscience.<sup>3</sup>

§ 114. **Judgment must be against conscience; diligence required; merits must appear.** The general principle underlying the jurisdiction is that it must be against conscience to execute the judgment sought to be enjoined. And it must clearly appear that the person aggrieved could not avail himself at law of the equities relied upon to enjoin the judgment; or, if he was in a position to avail himself of such equities in defense of the action at law, that he was prevented from so doing by accident, mistake or surprise, or by fraud of the adverse party unmixed with laches or negligence of his own.<sup>4</sup> In accordance with this principle a judgment

Willoe, 1 Sch. & Lef., 201, as follows: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because if a matter has been already investigated in a court of justice according to the common and ordinary rules of investigation, a court of equity can not take on itself to enter into it again. . . . The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law, and also in equity, and of which cognizance can not be effectually taken at law; and therefore equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defense because it was impossible for him to do it effectually at law; so

where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But without circumstances of that kind I do not know that equity ever does interfere to grant a trial of a matter which has been already discussed in a court of law—a matter capable of being discussed there, and over which the court of law had full jurisdiction."

<sup>3</sup> *Little v. Price*, 1 Md. Ch., 182; *Pearce v. Olney*, 20 Conn., 544; *Stanton v. Embry*, 46 Conn., 595.

<sup>4</sup> *Wingate v. Haywood*, 40 N. H., 437; *Wierich v. De Zoya*, 2 Gilm., 385; *Wright v. Eaton*, 7 Wis., 595; *Ableman v. Roth*, 12 Wis., 81; *Little v. Price*, 1 Md. Ch., 182; *Slack v. Wood*, 9 Grat., 40; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332;

will not be enjoined where there is no evidence of a good defense to the merits, or that the judgment is contrary to equity and against conscience.<sup>5</sup> *A fortiori* will the court refuse to interfere with the enforcement of a judgment where it would be against equity and good conscience to enjoin it.<sup>6</sup> And

Dugan v. Cureton, 1 Ark., 31; Andrews v. Fenter, *Ib.*, 186; Watson v. Palmer, 5 Ark., 501; Conway v. Ellison, 14 Ark., 360; Bently v. Dillard, 6 Ark., 79; Hempstead v. Watkins, *Ib.*, 317; Menifee's Administrators v. Ball, 7 Ark., 520; McCann v. Otoe Co., 9 Neb., 324; Nevins v. McKee, 61 Tex., 412; Headley v. Bell, 84 Ala., 346, 4 So., 391; Darling v. Mayor, 51 Md., 1; Gould v. Loughran, 19 Neb., 392, 27 N. W., 397; Knox County v. Harshman, 133 U. S., 152, 10 Sup. Ct. Rep., 257; Skirving v. National Life Ins. Co., 8 C. C. A., 241, 59 Fed., 742; Phillips v. Pullen, 45 N. J. Eq., 5, 16 Atl., 9; Brick v. Burr, 47 N. J. Eq., 189, 19 Atl., 842; Bailey v. Stevens, 11 Utah, 175, 39 Pac., 828.

<sup>5</sup> Ableman v. Roth, 12 Wis., 81; Hazeltine v. Reusch, 51 Mo., 50; Ratto v. Levy, 63 Tex., 278; Davis v. Overseer of the Poor, 40 N. J. Eq., 156; Muse v. Wafer, 29 Kan., 279; Wilson v. Shipman, 34 Neb., 573, 52 N. W., 576, 33 Am. St. Rep., 660; Lininger v. Glenn, 33 Neb., 187, 49 N. W., 1128. See also Masterson v. Ashcom, 54 Tex., 324. In Ableman v. Roth, 12 Wis., 81, the ground relied upon in support of the injunction to the judgment at law was that it was obtained through trickery of plaintiff's attorneys in forcing the case to trial in violation of a verbal agreement to the contrary. There was no

evidence offered of a good defense at law upon the merits. Dixon, C. J., says: "Upon the second reason we say that all courts and writers agree that equity interferes to stay proceedings at law only to prevent injustice by the unfair use of the process of the courts in which proceedings are pending. The fundamental and governing principle is that it is against conscience to permit the party enjoined to proceed. In case of a judgment it must be shown to be against conscience to allow it to be executed; otherwise the powers of the court will not be called into exercise. In addition to this, the injured party must show either that he could not have availed himself of the facts which make it unjust in the court of law, or that he was prevented from so doing by fraud, accident or mistake, without negligence on the part of himself or his agents (2 Story's Eq. Jur., § 887, and cases there cited). Courts of equity will not interfere to grant a new trial where no substantial right has been lost, and no unfair advantage gained, simply because by some trick or artifice a judgment which is just and equitable in itself has been obtained in advance of the time when it would otherwise have been rendered."

<sup>6</sup> Skirving v. National Life Ins. Co., 8 C. C. A., 241, 59 Fed., 742.

where complainant fails to show due diligence in availing himself of his defense at law, an injunction already granted may be dissolved, even though no answer is yet filed, it having been improperly awarded in the first instance.<sup>7</sup> And much stronger proof of diligence and freedom from fault is required where it is sought to enjoin the enforcement of a judgment than upon a motion for a new trial in the court in which the judgment was rendered.<sup>8</sup> And, in general, the lack of reasonable diligence upon the part of a defendant in looking after his interests in a pending action at law will be sufficient to prevent him from obtaining equitable relief against a judgment rendered against him.<sup>9</sup> And unless required so to do by motives of public policy the court never will, against equity and conscience, arrest the progress of proceedings at law.<sup>10</sup>

§ 115. **New trial; after discovered evidence; plaintiff must be free from fault.** The jurisdiction under discussion is frequently exercised by courts of equity upon a bill whose purpose is to procure a new trial in the action at law as well as to enjoin the judgment already obtained: and upon a bill of this nature, if the evidence discloses sufficient ground for a new trial by reason of newly discovered testimony, it would seem to be proper to enjoin the collection of the judgment.<sup>11</sup> But the discovery after the final decision of a cause of new testimony tending to establish the same defense relied upon on the trial of the action will not of itself authorize an injunction against the judgment,<sup>12</sup> especially if the new testimony might, by reasonable inquiry, have been elicited upon the former trial.<sup>13</sup> And in order to obtain an injunction

<sup>7</sup> *Slack v. Wood*, 9 Grat., 40.

<sup>11</sup> *Brown v. Luehrs*, 79 Ill., 575.

<sup>8</sup> *Village of Celina v. Eastport Savings Bank*, 15 C. C. A., 495, 68 Fed., 401. And see *Ferrell v. Allen*, 5 West Va., 43.

<sup>12</sup> *Campbell v. Briggs*, 3 Rob. (La.), 110; *Ware v. Horwood*, 14 Ves., 31.

<sup>9</sup> *Hollinger v. Reeme*, 138 Ind., 363, 36 N. E., 1114, 24 L. R. A., 46,

46 Am. St. Rep., 402.

<sup>13</sup> *Cairo & F. R. Co. v. Titus*, 12 C. E. Green, 102; *Kirby v. Pas-*

<sup>10</sup> *Craig v. Ankeney*, 4 Gill, 225.

against a judgment and a new trial upon the ground of newly discovered evidence, the plaintiff must show clearly that it was through no fault or negligence upon his part that the evidence was not discovered in time to avail at law; and where the discovery was made before the expiration of the time in which a motion for a new trial could have been made, but the plaintiff failed to take steps to secure it, the relief will be denied.<sup>14</sup> Where, however, facts material to establish the defense have been discovered since the trial, which the defendant could not sooner have discovered by the use of ordinary diligence, or where they have been fraudulently concealed, the relief may be allowed.<sup>15</sup> So if the after discovered evidence shows a mistake or miscalculation on the part of the jury, such as, if discovered in time, would have furnished good ground for a new trial, the judgment will be restrained.<sup>16</sup> And where the defense relied upon was fraud as to some of the debts out of which the action grew, but the fraud was not established, the defendant is entitled to an injunction restraining the judgment on the ground of after discovered evidence establishing fraud as to some of the debts, but not questioning others.<sup>17</sup> And the misconduct of a jury which would have been a sufficient basis for a new trial, but which, through no fault of the complainant, was not discovered until it was too late to make an application therefor, constitutes sufficient ground for an injunction against a judgment.<sup>18</sup> But a judgment will not be enjoined upon grounds which had been relied upon on a motion for a new trial, and which had on such motion been held insufficient.<sup>19</sup> Nor will an injunction

cault, 53 Md., 531; *Gorsuch v. uel*, 2 Heisk., 329.

Thomas, 57 Md., 334; *Carolus v.* <sup>16</sup> *Rust v. War*, 6 Grat., 50.

Koch, 72 Mo., 645. <sup>17</sup> *Billups v. Sears*, 5 Grat., 31.

<sup>14</sup> *Snider v. Rinehart*, 20 Col., <sup>18</sup> *Platt v. Threadgill*, 80 Fed., 448, 39 Pac., 408. 192.

<sup>15</sup> *Baltzell v. Randolph*, 9 Fla., <sup>19</sup> *Matson v. Field*, 10 Mo., 100; 366; *Gainsborough v. Gifford*, 2 *Telford v. Brinkerhoff*, 163 Ill., P. Wms., 424; *Hickerson v. Raig-* 439, 45 N. E., 156.

be allowed for the purpose of obtaining a new trial when the party aggrieved has already obtained a new trial at law, but through his own negligence has lost the opportunity of making his defense.<sup>20</sup> And a judgment will not be enjoined upon grounds arising after its recovery, the judgment debtor having had a full hearing in the action at law.<sup>21</sup>

§ 116. **The same; perjury no ground for relief; false answer under oath.** As illustrating the grounds upon which equity interferes by injunction against a judgment at law and for the purpose of obtaining a new trial, it is held that where complainant shows matter sufficient to have defeated a recovery in the action at law, but the defense was not interposed in that action because not discovered until after judgment and until too late to move for a new trial, the judgment should be enjoined, sufficient reason being shown why the defense was not discovered in time to be used in the action at law.<sup>22</sup> Equity will not, however, restrain the enforcement of a judgment at law because of newly discovered evidence tending to show payment of the demand upon which the action is brought, when such evidence is clearly insufficient to sustain the defense of payment.<sup>23</sup> Nor will a judgment be enjoined upon the ground of newly discovered evidence in the absence of any proof of diligence regarding the production of or effort to produce such evidence upon the trial of the action.<sup>24</sup> Especially will the relief be refused when the failure to acquire knowledge of the defense in time to defend at law resulted from the negligence and laches of the defendant himself, and when he has been guilty of inexcusable negligence in ignoring facts sufficient to put a prudent man upon inquiry as to the matters of defense.<sup>25</sup> Nor does it afford suf-

<sup>20</sup> *Dodge v. Strong*, 2 Johns. Ch., 228.

<sup>21</sup> *Dobbs v. St. Joseph F. & M. I. Co.*, 72 Mo., 189.

<sup>22</sup> *Ferrell v. Allen*, 5 West Va., 43.

<sup>23</sup> *Ludington v. Handley*, 7 West Va., 269.

<sup>24</sup> *Crim v. Handley*, 4 Otto, 652; *Hevener v. McClung*, 22 West Va., 81.

<sup>25</sup> *Hill v. Harris* 51 Ga., 628.



ficient ground for enjoining a judgment that perjury was committed by witnesses upon the trial of the action; otherwise litigation would be interminable.<sup>26</sup> But where the plaintiff in an action at law has obtained a judgment by means of a forged document which was offered in evidence and which resulted in the judgment, and the fact of the forgery was not known to the defendant at the time of the trial and was not discovered until after the expiration of the time in which a new trial could have been sought, relief will be granted since it would be manifestly against conscience to enforce the judgment.<sup>27</sup> And where the defendant in a chancery proceeding, by means of a false answer under oath touching certain fraudulent transactions of which complainant could have no knowledge except through such answer, persuades complainant to abandon his suit and thereupon procures a dismissal for want of equity, he may afterwards, upon the discovery of the falsity of the answer, be enjoined from setting up the decree as an adjudication in his favor.<sup>28</sup>

§ 117. **The same; what must be shown.** It is thus shown that, to warrant a court of equity in enjoining a judgment at law and awarding a new trial in the action because of newly discovered evidence, substantially the same grounds must be shown as are necessary to justify a court of law in awarding a new trial. In other words, it must satisfactorily appear that the judgment is manifestly wrong; that the evidence has come to the knowledge of complainant after the trial at law; that he had exhausted all reasonable means to obtain it before the trial, and that it would, upon the trial, produce a different result, and unless these facts sufficiently appear the bill can not be maintained.<sup>29</sup> Nor will equity en-

<sup>26</sup> *Cotzhausen v. Kerting*, 29 Fed., 589, 12 Sup. Ct. Rep., 62.

821; *Bailey v. Willeford*, 126 Fed., 803; *Steen v. March*, 132 Cal., 616. <sup>28</sup> *Graver v. Faurot*, 22 C. C. A., 156, 76 Fed., 257.

64 Pac., 994; *Maryland Steel Co. v.* <sup>29</sup> *Holmes v. Stateler*, 57 Ill., 209; *Marney*, 91 Md., 360, 46 Atl., 1077. *Bloss v. Hull*, 27 West Va., 503.

<sup>27</sup> *Marshall v. Holmes*, 141 U. S.,

tain a bill of this nature unless complainant can impeach the justice of the verdict at law by facts of which he could not before avail himself by reason of accident, mistake or fraud in the conduct of his adversary. And the inquiry is whether, if the judgment were set aside and a new trial awarded, complainant, upon the showing made, would be entitled to a recovery in the action at law.<sup>30</sup> Where, therefore, a judgment has been rendered without fraud being practiced upon the defendant, and by consent of her attorney, who was employed by defendant's husband, acting as her agent and under a power of attorney, the judgment will not be enjoined and a new trial awarded because of the sickness of defendant at the time of the rendition of the judgment, no valid defense to the action being shown.<sup>31</sup> But where a new trial has been granted unconditionally in a cause, the effect of which is to vacate a judgment previously rendered therein as effectually as if the judgment had been set aside in express terms, and an attempt is afterward made to enforce such judgment by levy and sale, equity may properly interpose by injunction to restrain its enforcement.<sup>32</sup>

§ 118. **Relief not based on error in judgment; not allowed on information and belief.** It is important to observe in the consideration of this branch of the preventive relief extended by courts of equity that they do not interfere with judgments at law upon the ground that the judgment was erroneously rendered, but only upon the ground that its enforcement would be contrary to equity and good conscience, as evidenced by facts of which the aggrieved party could not avail himself as a defense at law; and this being made to appear, a proper case is presented for enjoining the enforcement of the judgment.<sup>33</sup> But the legal presumption being in favor of the

<sup>30</sup> *Cotton v. Hiller*, 52 Miss., 7.

<sup>32</sup> *Rickets v. Hitchens*, 34 Ind.,

<sup>31</sup> *Newman v. Morris*, 52 Miss., 348.  
402.

<sup>33</sup> *New York & H. R. Co. v. Haws*, 56 N. Y., 175.

legality and fairness of a judgment and execution, equity will not enjoin their enforcement upon a bill alleging fraud and collusion when the allegations are made only upon information and belief, and are positively denied by the affidavit of one of the parties charged with the fraud.<sup>34</sup>

§ 119. **Sale under execution against third person, when enjoined.** The aid of an injunction is frequently sought for the purpose of preventing a threatened sale of one's property under execution against a third person. While the authorities are not wholly uniform or reconcilable upon this question, the better rule and that having the clear weight of authority in its support undoubtedly is that, where one's personal property is taken in execution to satisfy the debt of another, equity may interfere for the purpose of retaining the property *in specie*, notwithstanding the remedy at law for the recovery of the property or of damages for its detention. The jurisdiction is akin to that entertained by courts of equity to compel a performance of contracts *in specie*, and is founded upon the necessity of protecting property rights where courts of law afford at best but uncertain and insufficient reparation in damages.<sup>35</sup> And a levy under an execution against third per-

<sup>34</sup> Jones v. Thacher, 48 Ga., 83.

<sup>35</sup> Watson v. Sutherland, 5 Wal., 74; Hardy v. Broadus, 35 Tex., 668; Poincy v. Burke, 28 La. An., 673; Lewis v. Daniels, 23 La. An., 170; Deville v. Hayes, 23 La. An., 550; Wilson v. Butler, 3 Munf., 559. The grounds of the jurisdiction in such cases are well set forth in the opinion of the court in Wilson v. Butler, as follows: "Although a party whose property is taken in execution to satisfy the debt of another may proceed to recover that property or damages for the taking and detaining thereof in a court of law; and although

it is competent to a sheriff having doubts as to the title of the property taken in execution to demand from the creditor an indemnifying bond pursuant to the act in such case made and provided, yet neither of those remedies are in exclusion of a proceeding in equity having for its object the retention of the property *in specie*. Every argument on which the jurisdiction of the courts of equity to compel a performance of a contract *in specie* is founded is supposed to hold with equal force at least in favor of retaining a subject of property which another,

sons upon property owned *bona fide* by complainant and which constitutes his stock in trade presents such elements of apprehended damage and injury as are not susceptible of relief by action at law, and constitutes sufficient ground for an injunction.<sup>36</sup> So a landlord having a prior lien for rent upon property on the demised premises, and having issued his distress warrant, may enjoin a sale of such property under execution against the tenant.<sup>37</sup> And one who has purchased personal property from a judgment debtor may enjoin a sale of the property under execution until other property subject to execution has been first exhausted.<sup>38</sup> So where a judgment creditor is proceeding to levy his execution and sell the property of his judgment debtor pending proceedings in garnishment against the latter, the debtor is entitled to restrain the collection of the judgment pending such proceedings, since without such relief he might be compelled to pay the judgment twice.<sup>39</sup> And where property has been illegally taken in execution under a judgment which is not subject to the lien of the judgment, as in the case of individual property of a member of a school district which is seized to satisfy a debt of the district, its sale under execution may be enjoined.<sup>40</sup> So equity will enjoin the sale of stock in a corporation by a sheriff proceeding under a judgment against a former owner of the stock, at the instance of one who has received an assignment of the shares and holds the certificates thereof but

having no title thereto, claims to arrest and dispose of by means of an execution, rather than turn the rightful owner round to seek an uncertain and inadequate reparation in damages." And see *Walker v. Hunt*, 2 West Va., 491; *McFarland v. Dilly*, 5 West Va., 135; *Ford v. Rigby*, 10 Cal., 449; *McCreery v. Sutherland*, 23 Md., 471. But see, *contra*, *Lewis v. Levy*, 16 Md., 85; *Freeland v. Reynolds*,

*Ib.*, 416; *Baker v. Rinehard*, 11 West Va., 238; *Zanhizer v. Hefner*, 47 West Va., 418, 35 S. E., 4; *Payne v. Graham*, 23 La. An., 771; *Chappell v. Cox*, 18 Md., 513; *Amis v. Myers*, 16 How., 492.

<sup>36</sup> *McCreery v. Sutherland*, 23 Md., 471.

<sup>37</sup> *Click v. Stewart*, 36 Tex., 280.

<sup>38</sup> *Sidener v. White*, 46 Ind., 588.

<sup>39</sup> *Keith v. Harris*, 9 Kan., 386.

<sup>40</sup> *Kenyon v. Clarke*, 2 R. I., 67.

who has failed to have the stock transferred upon the books of the company, where neither the statute nor the by-laws of the corporation require that the stock shall be transferable only upon the books of the company.<sup>41</sup> But where it is sought to enjoin a sale by a sheriff under execution of property alleged to be held in trust for a third person, the bill should set forth the judgment and execution with sufficient particularity to give color of right in the sheriff to make the levy and sale.<sup>42</sup> And in such case the bill should also give color of right in the alleged trustee, since otherwise there is nothing to enjoin.<sup>43</sup>

§ 120. **The same; relief not allowed where remedy at law; not allowed against sale of real estate.** To the general rule as thus illustrated there are certain exceptions deserving of notice, but which are themselves based upon well established principles pertaining to the law of injunctions. And first, it is to be noticed that in this class of cases, as in all others where the extraordinary remedy of injunction is sought, the courts decline to interfere to restrain the sale under execution against a third person when a plain and effectual remedy is provided by law for determining the question of title to the property levied upon. In such cases the courts apply the familiar rule denying preventive relief by injunction where a sufficient remedy exists at law; and if no sufficient reason is shown for not resorting to the remedy at law, the person aggrieved will be remitted to that remedy.<sup>44</sup> As illustrating the rule, it is held that the relief should be denied where it does not appear that the chattels are of peculiar value to the owner or that the threatened levy and sale would result in collateral or consequential damage.<sup>45</sup> So a court of equity

<sup>41</sup> *Allen v. Stewart*, 7 Del. Ch., 287, 44 Atl., 786.

<sup>42</sup> *Trueblood v. Hollingsworth*, 48 Ind., 537.

<sup>43</sup> *Id.*

<sup>44</sup> *Ferguson v. Herring*, 49 Tex., 126; *Baker v. Rinehard*, 11 West Va., 238, criticising *Walker v.*

*Hunt*, 2 West Va., 491; *Zanhizer v. Hefner*, 47 West Va., 418, 35 S.

E., 4; *Beatty v. Smith*, 14 S. Dak., 24, 84 N. W., 208; *Bostic v. Young*, 116 N. C., 766, 21 S. E., 552.

<sup>45</sup> *Allen v. Winstandly*, 135 Ind., 105, 34 N. E., 699.



will not interpose by injunction to prevent a sale of complainant's real estate under execution against another, since the question of title to real estate is ordinarily to be determined at law, and a mere trespass will not be enjoined unless the legal remedy is inadequate.<sup>46</sup> Nor will the aid of an injunction be extended in behalf of one claiming under a fictitious or fraudulent sale from a judgment debtor, made with the intent to prevent his creditors from reaching the property, to restrain a sale of the property thus transferred under execution against the debtor.<sup>47</sup> So a sale of chattels under execution will not be enjoined when it is not shown that any injury will result for which full and adequate relief may not be had at law.<sup>48</sup> And where a judgment debtor has consigned property to his factors or brokers, who have received a bill of lading as security for advances made by them to the former, but before they receive the property it is levied upon under execution against the debtor, an injunction will not be granted in behalf of the factors to prevent the levy.<sup>49</sup> As further illustrating the general principle that equitable relief will not be granted against judgments where there is an adequate remedy at law, it is held, in a case where complainant seeks to enjoin the enforcement of a judgment of a justice of the peace upon the ground that an appeal has been taken but the justice refuses to approve the appeal bond, that the relief should be denied since the complainant has an adequate remedy by *mandamus* against the justice.<sup>50</sup>

<sup>46</sup> *Wilson v. Hyatt*, 4 S. C., 369; *Bostic v. Young*, 116 N. C., 766, 21 S. E., 552. And see, for a discussion of the doctrine in cases of sales of real estate under execution against a third person, chapter VI, *post*, § 367 *et seq.*

<sup>47</sup> *Mora v. Avery*, 22 La. An., 417; *Lewis v. Dinkgrave*, 24 La. An., 489.

<sup>48</sup> *Stillwell v. Oliver*, 35 Ark., 184; *Jacks v. Bigham*, 36 Ark., 481. But in Washington a contrary rule would seem to prevail. *Grant v. Cole*, 23 Wash., 542, 63 Pac., 263.

<sup>49</sup> *Chaffraix v. Harper*, 26 La. An., 22.

<sup>50</sup> *Boyd v. Weaver*, 134 Ind., 266, 33 N. E., 1027.

§ 121. **Excessive levy not enjoined.** The fact that a sheriff in levying an execution upon property of a judgment debtor makes an excessive levy does not of itself justify a resort to the writ of injunction when full relief may be had in such case by application to the court in which the judgment was rendered.<sup>51</sup> Nor can a judgment debtor enjoin a sale under execution upon the ground that the sheriff has seized immovable property when he should, under the law of the state, have first levied upon movable property, when the debtor refuses upon the application of the sheriff to point out property on which to levy.<sup>52</sup>

§ 122. **Sale of personal property exempt from execution; conflict of authority.** Upon the question of the right of a judgment debtor to enjoin a sale of his personal property under execution, upon the ground that it is exempt by law from sale under judicial process, the authorities are conflicting. Thus, it has been held in Texas that a sale of personal property which is exempt from execution may be restrained by the judgment debtor,<sup>53</sup> and a similar doctrine prevails in Nebraska;<sup>54</sup> while in North Carolina it is held that such a sale will not be enjoined upon the application of the debtor, but he will be left to pursue his legal remedy;<sup>55</sup> and the rule has thus been announced in Oregon.<sup>56</sup> Upon principle, it is difficult to perceive any satisfactory reason for interfering by injunction in such cases, since adequate relief may usually be had by an action at law.

<sup>51</sup> *Palmer v. Gardiner*, 77 Ill., 143; *Hefner v. Hesse*, 29 La. An., 149. As to the effect of a bill to enjoin an execution for costs upon the ground that they are excessive, and for a retaxation of the costs, see *Lockart v. Stuckler*, 49 Tex., 765.

<sup>52</sup> *Hefner v. Hesse*, 29 La. An., 149.

<sup>53</sup> *Nichols v. Claiborne*, 39 Tex., 363; *Stein v. Frieberg*, 64 Tex., 271.

<sup>54</sup> *Cunningham v. Conway*, 25 Neb., 615.

<sup>55</sup> *Baxter v. Baxter*, 77 N. C., 118.

<sup>56</sup> *Parsons v. Hartman*, 25 Ore., 547, 37 Pac., 61, 30 L. R. A., 98,

42 Am. St. Rep., 803.

§ 122 *a*. **Sale of property of quasi-public corporation enjoined.** Where the exemption arises from the fact that the property which it is sought to reach by execution is impressed with a public use, being that of a quasi-public corporation, the relief will be granted upon principles of public policy. Thus, where an execution is about to be levied upon the real estate of a railway or canal company, an injunction is properly granted, thereby preventing the corporation from being so crippled as to be unable to discharge its public functions.<sup>57</sup>

§ 123. **Judgment paid in whole or in part; conflict of authority as to right to injunction.** There is a noticeable want of harmony in the authorities upon the question of the right to enjoin the enforcement of a judgment which has been already paid either in whole or in part. The better considered doctrine upon this subject, and that most in harmony with the general principles underlying the preventive jurisdiction of equity, is that an injunction should not be granted for the purpose of staying or preventing a sale under execution on the ground of payment in whole or in part, and that in all such cases the person aggrieved should be left to pursue his remedy at law.<sup>58</sup> There are not wanting, however, respectable authorities to the contrary. Thus, it is held that if the judgment has already been fully paid, sufficient ground is presented for enjoining any attempt at its further enforcement.<sup>59</sup> Or, if the judgment has been paid in part, and a lawful tender is made of the residue, it is held that equity may properly enjoin the further enforcement of the judgment.<sup>60</sup> And when a judgment is rendered in behalf of one

<sup>57</sup> *Brady v. Johnson*, 75 Md., 445, 26 Atl., 49, 20 L. R. A., 737; *dinal v. Eau Claire L. Co.*, 75 Wis., 404, 44 N. W., 761. And see *McColgan v. B. B. R. Co.*, 85 Md., 519, 36 Atl., 1096; *Parker v. Jones*, 5 Jones Eq., 276; *Hall v. Taylor*, 18 West Va., 544.

<sup>58</sup> *Lansing v. Eddy*, 1 Johns. Ch., 49; *Foster v. Wood*, 6 Johns. Ch., 87; *Howell v. Thomason*, 34 West Va., 794, 12 S. E., 1088; *Car-* And see *Buster v. Holland*, 27 West Va., 510.

<sup>59</sup> *Buie v. Crouch*, 37 Tex., 53.

<sup>60</sup> *Bowen v. Clark*, 46 Ind., 405.

who occupies a relation of trustee for others as to the demand sued upon, and the beneficiaries in the judgment acknowledge satisfaction thereof, the trustee, it is held, may be enjoined from collecting the judgment, notwithstanding the beneficiaries, as between themselves and the trustee, have not been paid.<sup>61</sup> So when a judgment is obtained against garnishees in an attachment suit, which they are compelled to pay, an injunction is the appropriate remedy to protect them from the enforcement of a judgment against them and in favor of the original creditor for the same indebtedness.<sup>62</sup> So when an execution is issued for a larger amount than is actually due, it is regarded as proper to grant an injunction as to such excess.<sup>63</sup> But a failure to credit part payment on a judgment will not warrant an injunction restraining the enforcement of the entire judgment.<sup>64</sup> And where a judgment has been enjoined because of payments having been made for which no credit is given, and defendant in his answer admits a partial payment, the injunction will be made perpetual as to such amount, and will be dissolved as to the balance yet due.<sup>65</sup> So if the judgment debtor, during the pendency of the injunction, should pay a portion of the judgment enjoined, the injunction will be made perpetual as to the amount paid.<sup>66</sup>

§ 124. **Jurisdiction not exercised in criminal matters.** The jurisdiction of equity being limited strictly to questions concerning civil and property rights, the courts will not in any manner interfere with the execution of judgments in criminal matters. An injunction, therefore, will not be granted in behalf of persons convicted of criminal offenses and imprisoned in a county jail to prevent the use of such jail for

<sup>61</sup> Meyer v. Tully, 46 Cal., 70.

<sup>64</sup> Cobb v. Hynes, 4 La. An., 150.

<sup>62</sup> Allen v. Watt, 79 Ill., 284.

<sup>65</sup> Perry v. Kearney, 14 La. An.,

<sup>63</sup> Miles v. Davis, 36 Tex., 690. 401.

See also Gentry v. Lockett, 37 Tex., 503.

<sup>66</sup> Tapp v. Beverley, 1 Leigh, 80.

their confinement upon the ground of its being extremely unhealthy and dangerous to life, since to grant the relief desired in such case would be an interference with the execution of judgment in a criminal cause. And especially will the court decline to interfere in such case when ample provision exists at law for the grievance complained of.<sup>67</sup>

§ 125. **Judgment not enjoined because of want of jurisdiction.** The purpose for which the interference is allowed being to prevent injustice, a defect in jurisdiction in the court in which the judgment was rendered will not of itself authorize an injunction, if no equitable reason is shown why the judgment should not be enforced.<sup>68</sup> Even if the judgment is altogether void for want of jurisdiction equity will not enjoin, but will leave the parties to their remedy at law by *certiorari*.<sup>69</sup>

§ 126. **Good defense to merits must be shown.** No rule of the law of injunctions is more firmly established than that which requires a suitor who seeks the aid of equity against the enforcement of a judgment to allege and show, not only that it would be against equity and good conscience to execute the judgment, but that he has a good and valid defense to the claim upon which it was founded.<sup>70</sup> The obvious rea-

<sup>67</sup> *Stuart v. Supervisors of La Salle Co.*, 83 Ill., 341. And see *Massachusetts B. L. Assn. v. Lohmiller*, 20 C. C. A., 274, 74 Fed., 23; *Rotan v. Springer*, 52 Ark., 80, 12 Ill., 155, 66 N. E., 323.

<sup>68</sup> *Stokes v. Knarr*, 11 Wis., 389; *Crandall v. Bacon*, 20 Wis., 639.

<sup>69</sup> *Crandall v. Bacon*, 20 Wis., 639.

<sup>70</sup> *Taggart v. Wood*, 20 Iowa, 236; *Sauer v. City of Kansas*, 69 Mo., 46; *Gifford v. Morrison*, 37 Ohio St., 502; *Williams v. Hitzie*, 83 Ind., 303; *Boyd v. Weaver*, 134 Ind., 266, 33 N. E., 1027; *Ratto v. Levy*, 63 Tex., 278; *Meinert v. Harder*, 39 Ore., 609, 65 Pac., 1056; *Massachusetts B. L. Assn. v. Lohmiller*, 20 C. C. A., 274, 74 Fed., 23; *Rotan v. Springer*, 52 Ark., 80, 12 S. W., 156; *Burch v. West*, 134 Ill., 258, 25 N. E., 658; *Wilson v. Shipman*, 34 Neb., 573, 52 N. W., 576, 33 Am. St. Rep., 660; *Raisin Fertilizer Co. v. McKenna*, 114 Ala., 274, 21 So., 816. In Nebraska it is held that the court should not go into the merits of complainant's alleged defense further than to determine that a *prima facie* defense is presented and is



son for the rule is that the court will not lend its aid and grant a new trial where the final result will not be changed. An exception has been recognized by some courts in cases where the judgment is absolutely void for want of service of process but these cases only serve to emphasize the rule.<sup>71</sup> The doctrine has been carried even further, and it has been held that it must clearly appear that the plaintiff in the action at law had in fact no cause of action. This being shown to the satisfaction of the court, the judgment will be enjoined if there has been no laches or negligence upon the part of complainant.<sup>72</sup> And it is not sufficient to bring the case within the rule that the bill should allege generally that the complainant has a good defense to the action at law, and that it would be inequitable to enforce it; but the facts constituting such defense should be clearly set forth.<sup>73</sup> But if the judgment, as between the parties thereto, has been fairly obtained, it will not be restrained upon the ground of mere hardship to others.<sup>74</sup>

§ 127. **Effect of injunction on lien of judgment and execution.** As regards the effect of the injunction upon the lien of the judgment enjoined, it is to be remembered that it operates only *in personam* upon the judgment creditor, and not upon the judgment itself; the lien is therefore not divested or suspended, but only the execution stayed.<sup>75</sup> And an injunction

urged in good faith. It would seem to follow from this that when the complainant has made out such a *prima facie* case, the injunction should be granted until the ultimate determination of that defense in a new trial at law. *Bankers Life Ins. Co., v. Robbins*, 53 Neb., 44, 73 N. W., 269.

<sup>71</sup> See, *post*, §§ 222 and 229 *a*. And where the wrong complained of has not even the color of a judgment back of it, as the levy of an execution based upon a mere find-

ing of a justice of the peace upon which no judgment has been rendered, no defense need be shown. *Sare v. Butcher*, 141 Ind., 146, 40 N. E., 749.

<sup>72</sup> *Huebschman v. Baker*, 7 Wis., 542.

<sup>73</sup> *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb., 552, 37 N. W., 462; *Fickes v. Vick*, 50 Neb., 401, 69 N. W., 951.

<sup>74</sup> *Scott v. Whitlow*, 20 Ill., 310.

<sup>75</sup> *Miller v. Estill*, 8 Yerg., 452; *Anderson v. Tydings*, 8 Md., 427.

restraining a sheriff from proceeding with an execution under a judgment does not impair the execution or destroy or impair a levy made thereunder. It is therefore competent for the sheriff, after the dissolution of the injunction, to complete the proceedings begun under the execution.<sup>76</sup> But an injunction restraining a judgment creditor from all proceedings on his judgment recovered at law has the effect of restraining him from proceedings in equity as well.<sup>77</sup>

§ 128. **Release of errors in judgment enjoined.** It has been held that an injunction of a judgment is a release of all errors in the proceedings enjoined.<sup>78</sup> But even under a statute providing that the injunction shall operate as a release of errors at law, the writ will not have this effect if it only restrains the judgment creditor from further proceedings under his execution without enjoining the judgment itself.<sup>79</sup> And such a statute, it is held, does not apply to proceedings in chancery or to those of an equitable nature; nor does it apply to judgments which are absolutely void, as for want of service of process, instead of being merely erroneous.<sup>80</sup> And the better doctrine seems to be that, in the absence of any statutory enactment upon the subject, the injunction does not necessarily operate as a release of errors in the judgment enjoined.<sup>81</sup> In no event can such an injunction have the effect of releasing errors in the proceedings at law except as to the party obtaining the injunction. Thus, a garnishee who enjoins proceedings against himself under the garnishment does not

And see *Pettingill v. Moss*, 3 Minn., 222. But see, *contra*, as to the effect of the lien, *Keith v. Wilson*, 3 Met. (Ky.), 201.

<sup>76</sup> *Knox v. Randall*, 24 Minn., 479.

<sup>77</sup> *Little v. Price*, 1 Md. Ch., 182.

<sup>78</sup> *Price v. Johnson Co.*, 15 Mo., 433. And in Illinois this is so by statute. See *McConnell v. Ayres*, 3 Scam., 210. So it is held, under a statute of Missouri, that what-

ever technical errors exist in the proceedings at law are released by an injunction against the judgment. *Hazeltine v. Reusch*, 51 Mo., 50.

<sup>79</sup> *St. Louis, A. & T. H. R. Co. v. Todd*, 40 Ill., 89.

<sup>80</sup> *San Juan & St. L. M. & S. Co. v. Finch*, 6 Col., 214.

<sup>81</sup> *Gano v. White*, 3 Ohio, 20.

thereby release errors that may have occurred in the proceedings against the defendants in attachment.<sup>82</sup>

§ 129. **The same.** Where it is provided by statute that a party asking an injunction against the enforcement of a judgment shall first release over his signature all errors in entering up the judgment, he is estopped from setting up the fact of his own wrong in having obtained an injunction without such release of errors.<sup>83</sup> But a statute providing that the suing out of an injunction against proceedings under a judgment at law shall operate as a release of all errors in the judgment does not apply to cases where the act enjoined is itself in violation of law.<sup>84</sup> And such a statute operates only as a release of such errors as might be assigned for reversal of the judgment in an appellate tribunal, and does not preclude the judgment debtor from assailing the judgment for matters *dehors* the record, as that the judgment was obtained through fraud.<sup>85</sup>

§ 130. **Amount due must be paid or tendered.** As a general rule, he who seeks to restrain the enforcement of a judgment at law or of proceedings under a judgment must first pay or tender payment of the amount really due, and failing to do this he will be denied relief in a court of equity.<sup>86</sup> And if the judgment draws interest, it must be included in the amount so tendered.<sup>87</sup> And when separate judgments for the same cause of action are rendered against each of two wrong-doers, one of such judgment debtors can not enjoin the judgment against himself until satisfaction or payment of one or the other judgment.<sup>88</sup>

<sup>82</sup> Taylor v. Ricards, 9 Ark., 378.

<sup>83</sup> McFarland v. Rogers, 1 Wis., 452.

<sup>84</sup> Burge v. Burns, 1 Morris (Iowa), 287.

<sup>85</sup> Bass v. Nelms, 56 Miss., 502.

<sup>86</sup> Baragree v. Cronkhite, 33 Ind., 192; Russell v. Cleary, 105 Ind.,

502, 5 N. E., 414; Yonge v. Sheperd, 44 Ala., 315; Smith v. Smith, 75 Tex., 410, 12 S. W., 678.

<sup>87</sup> Eaton v. Markley, 126 Ind., 123, 25 N. E., 150.

<sup>88</sup> Meixell v. Kirkpatrick, 25 Kan., 19.

§ 131. **Creditor without judgment not allowed to enjoin sale of debtor's property under execution.** A simple contract creditor, whose rights are not yet reduced to judgment, is not entitled to an injunction restraining the disposition of his debtor's property under certain judgments alleged to have been obtained in fraud of his rights, even though he has begun suit at law upon his claim. For, until the creditor's rights are established by judgment at law, interference by equity would necessarily lead to oppressive and often fruitless interruption of the debtor in the rightful enjoyment of his property.<sup>89</sup> Nor does an attaching creditor, who has not yet reduced his claim to judgment, stand in any better light than one who sues by the ordinary process of the courts; and he will not be allowed to enjoin the disposal of the debtor's property on execution, even though the judgments under which the execution issues were fraudulently confessed by the debtor.<sup>90</sup>

§ 132. **Requisites of bill; parties necessary.** Where an injunction is sought against proceedings at law under a judgment, the bill, as between the parties to the suit at law, is not considered as an original bill. But if other parties are joined in the bill, and different interests are involved, it is to that extent considered as an original bill.<sup>91</sup> To sustain the injunction the bill should show upon what evidence the judgment was found, as well as what defense complainant has against the judgment, and why such defense was not made upon the trial at law.<sup>92</sup> And, in general, a perpetual injunction against a judgment will not be allowed unless all

<sup>89</sup> *Wiggins v. Armstrong*, 2 Johns. Ch., 144; *Angell v. Draper*, 1 Vern., 399; *Shirley v. Watts*, 3 Atk., 200; *Bennet v. Musgrove*, 2 Ves., 51; *Young v. Frier*, 1 Stockt., 465; *Holdrege v. Gwynne*, 3 C. E. Green, 26. See also *Bigelow v. Andress*, 31 Ill., 322. But see, *contra*, *Heyne-man v. Dannenberg*, 6 Cal., 376. And see *Cogburn v. Pollock*, 54 Miss., 639.

<sup>91</sup> *Dunn v. Clarke*, 8 Pet., 1.

<sup>92</sup> *Buntain v. Blackburn*, 27 Ill.,

<sup>90</sup> *Martin v. Michael*, 23 Mo., 50. 406.

the parties in whose favor the judgment was rendered are joined as defendants and have filed their answers.<sup>93</sup> So, as a general rule, no person will be allowed to enjoin a judgment to which he is not a party or privy.<sup>94</sup>

§ 133. **When injunction refused; writ of error no bar to injunction.** An injunction should not be granted to stay a judgment, the effect of which would be to retry the issue in equity, where complainant does not allege any surprise or fraud in the trial at law, and no defect of evidence, and where he makes no appeal to the conscience of the defendant for a discovery.<sup>95</sup> Nor will the relief be granted upon grounds which have been fully tried as a defense at law, even though the court may be of the opinion that such defense should have been sustained at law.<sup>96</sup> But the effect of a bill in chancery to enjoin proceedings under a judgment being not to revise the proceedings at law, but rather to urge equities independent of the judgment as affording reasons for not enforcing it, the fact that a writ of error has been sued out upon the proceedings at law constitutes no bar to the awarding of an injunction.<sup>97</sup>

§ 134. **Failure of consideration; accommodation indorser.** Failure of consideration is sometimes relied upon as a ground

<sup>93</sup> *Marshall v. Beverly*, 5 Wheat., 313; *Mayes v. Woodall*, 35 Tex., 687.

<sup>94</sup> *Jordan's Adm'r v. Williams*, 3 Rand., 501.

<sup>95</sup> *Brown v. Street*, 6 Rand., 1.

<sup>96</sup> *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332.

<sup>97</sup> *Parker v. Judges*, 12 Wheat., 561. *Marshall, C. J.*, giving the opinion of the court says: "It is contended that an injunction could not be awarded while the record was before this court on a writ of error. We do not think this a valid objection. The suit in

chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit or after its decision by the highest law tribunal."



for enjoining proceedings under judgments, but the jurisdiction in this class of cases is somewhat sparingly exercised. Thus, in the absence of fraud an injunction will not be granted against a judgment obtained on a contract under seal upon the ground that the contract was merely voluntary and without consideration, the rights of purchasers and creditors not coming in question.<sup>98</sup> So a failure to perform the covenants in a deed, which covenants were the consideration for the giving of a note, does not constitute sufficient equity to warrant a court in enjoining a judgment upon the note in favor of a third person to whom it had been transferred.<sup>99</sup> A court of equity may, however, enjoin a judgment on an assigned note because of failure of consideration where the facts limiting the right of recovery are complicated and inappropriate for the determination of a jury, even though the defense was not made at law.<sup>1</sup> And where, in a suit prosecuted to a court of last resort, the makers of a promissory note were held not liable on the ground of illegality of consideration, an accommodation indorser was allowed to enjoin a judgment against him on the same note, even though he had not shown diligence in defending at law. In such case the accommodation indorser is regarded in the light of a surety, and, his principal being discharged, the surety should also be discharged.<sup>2</sup>

§ 135. **Injunction against sale under execution, when operative; duty of sheriff; amount of judgment need not be brought into court.** It has been held that an order for an injunction to restrain a sale under execution does not become operative to stay proceedings under the execution until complainant has complied with the terms of the order by giving the necessary

<sup>98</sup> *Stubblefield v. Patterson*, 1 Hayw. (Tenn.), 128.

<sup>1</sup> *Reese v. Walton*, 4 B. Mon., 507.

<sup>99</sup> *Gridley v. Tucker*, Freem. Ch., 209.

<sup>2</sup> *Miller v. Gaskins*, Sm. & M. Ch., 524.

bond and security.<sup>3</sup> And it is considered no contempt of court in such case to proceed with the sale, notwithstanding plaintiff in execution was apprised of the order for the injunction.<sup>4</sup> And when an injunction is served upon a sheriff restraining an execution in his hands, it is his duty to note the fact upon the execution, and to desist from all further proceedings, without, however, releasing the levy.<sup>5</sup> But where proceedings under a judgment are enjoined, the amount of the judgment need not be brought into court unless it appears that there is danger of insolvency.<sup>6</sup> And when a court has properly acquired jurisdiction of the cause, and has granted an injunction to restrain the sale of personal property under execution, it may retain jurisdiction for the purpose of awarding damages for detention of the property.<sup>7</sup>

§ 136. **Effect of death of plaintiff or defendant.** The pendency of an injunction to a judgment at law will not in case of the death of the defendant in the action at law prevent the revival of the judgment against his personal representatives. The object of the injunction being to prevent the enforcement of the judgment by execution until the equities of the case can be decided, a simple revival of the judgment will not prejudice complainant.<sup>8</sup> But a judgment will not be enjoined because of the death of plaintiff in the action before it was obtained in his name, and a bill filed for this purpose is demurrable by the legal representatives of the deceased. The error, being merely an error of fact, constitutes no sufficient equity to sustain an injunction.<sup>9</sup> Nor will a judgment be enjoined because rendered against a defendant

<sup>3</sup> *Clarke v. Hoome's Ex'rs*, 2 Hen. & M., 23.

<sup>4</sup> *Id.*

<sup>5</sup> *Pettingill v. Moss*, 3 Minn., 222.

<sup>6</sup> *Rodgers v. Rodgers*, 1 Paige, 426.

<sup>7</sup> *Chambers v. Cannon*, 62 Tex., 293.

<sup>8</sup> *Richardson v. Prince*, 11 Grat., 190.

<sup>9</sup> *Williamson's Adm'r v. Appleberry*, 1 Hen. & M., 206.

after his death, since ample remedy may be had at law upon any attempt to enforce such judgment.<sup>10</sup>

§ 137. **Injunction for or against United States.** A bill in equity will not lie against the United States to enjoin proceedings under a judgment which has been paid, since the government is not liable to be sued except with its own consent given by law. But upon a proper showing in such case a stay of proceedings may be had until an investigation can be made of the facts.<sup>11</sup> Nor will an injunction be allowed in favor of the United States, in the absence of fraud, to restrain a sale of vessels on execution on the ground that they may possibly be taken beyond the jurisdiction and the claim of the government be thereby endangered.<sup>12</sup>

§ 138. **When tender necessary; injunction as to part of judgment.** In the exercise of the jurisdiction in restraint of proceedings at law the courts enforce a rigid application of the rule that he who would have equity must do equity. Where, therefore, complainants admit their indebtedness to defendant to the full amount of the judgment, they will not be allowed an injunction without tendering payment.<sup>13</sup> And where complainant, seeking to restrain a judgment against himself, admits that he owes a balance to defendant on account of the same matter, equity may require such balance to be brought into court and paid accordingly.<sup>14</sup> And in no event should an injunction be allowed against more of the judgment than is shown to be unjust and unconscionable.<sup>15</sup> Where, however, a bill of review is filed after judgment, and in this proceeding a reference is had by agreement to a master to report the amount actually due, and judgment is entered upon his

<sup>10</sup> *Lockridge v. Lyon*, 68 Ga., 137.

<sup>11</sup> *United States v. McLemore*, 4 How., 286; *Hill v. United States*, 9 How., 386.

<sup>12</sup> *United States v. Collins*, 4 Blatch., 142.

<sup>13</sup> *Overton v. Stevens*, 8 Mo., 622.

<sup>14</sup> *Flickinger v. Hull*, 5 Gill, 60.

<sup>15</sup> *Duncan v. Merrison*, Breese,

report for a less amount, which is paid, the enforcement of the original judgment may be enjoined.<sup>16</sup> Where the circumstances of the case require it the injunction will be dissolved as to a part and continued as to the residue.<sup>17</sup> And where part only of a judgment has been enjoined the residue stands as if it were the original, and draws interest from the date of the judgment.<sup>18</sup>

§ 139. **Minimum limit of jurisdiction; judgment in replevin; two funds.** Where by statute a minimum amount is fixed as a limit, under which the courts have no jurisdiction, equity will not restrain the collection of a judgment for less than that amount.<sup>19</sup> But where a judgment in replevin is in the alternative form—that is, for the return of the property, or, in default thereof, for the recovery of pecuniary damages—if a tender of the property replevied is made within a reasonable time the judgment creditor may be enjoined from enforcing by execution the alternative judgment for money.<sup>20</sup> Equity will not, however, restrain the enforcement of a judgment because there are two funds from which it may be realized, since the creditor has an undoubted right to pursue his remedy in each case until he obtains satisfaction of his debt.<sup>21</sup>

§ 140. **Mortgagees of railroad refused injunction against judgment creditor; superior equitable title.** Where a railroad company has mortgaged its road and equipments to

<sup>16</sup> *Johnson v. Kitch*, 100 Ind., 30.

<sup>17</sup> *Lyles v. Hatton*, 6 Gill & J., 122.

<sup>18</sup> *Copeland's Adm'r v. Reese*, Wright (Ohio), 728.

<sup>19</sup> *Breckinridge v. McCormick*, 43 Ill., 491. And under a statute of Illinois providing that no writ of injunction shall be issued to stay proceedings under a judgment recovered before a justice of the peace for a sum not exceeding \$20, besides costs, a bill will be

dismissed which seeks to enjoin a judgment for an amount less than that sum. *York v. Kile*, 67

Ill., 233.

<sup>20</sup> *McClellan v. Marshall*, 19 Iowa, 561; *Marks v. Willis*, 36 Ore., 1, 58 Pac., 526, 78 Am. St. Rep., 752. To the same effect, see *Thompson v. Laughlin*, 91 Cal., 313, 27 Pac., 752.

<sup>21</sup> *Muscatine v. Mississippi & M. R. Co.*, 1 Dillon, 536.

secure an indebtedness, the mortgagees will not be allowed to enjoin a judgment creditor from satisfying his judgment out of the personal property of the road on the ground that its possession is necessary to enable the company to pay the mortgage, it not appearing that the property remaining after such levy would be insufficient.<sup>22</sup> But a judgment followed by a levy upon lands with notice of a superior equitable title outstanding may be enjoined on payment of the costs at law.<sup>23</sup>

§ 141. **Sale of heir-looms, injunction refused; valuable work of art.** An injunction will not be granted to prevent the levy of an execution on certain articles of property on the ground that they are family heirlooms, such as pictures, relics and gifts from deceased friends, where there is no tender of the value of the articles. Nor in such case is the right to an injunction strengthened by the fact that complainant has more than enough property aside from the articles in question to satisfy all his debts.<sup>24</sup> Nor will equity enjoin the sale under execution of a valuable work of art upon the ground that there is no market for such property at the place where it is to be sold and a sale at such place would therefore result in a great sacrifice.<sup>25</sup>

§ 142. **Effect of injunction.** An injunction restraining defendant and all other persons from the sale of personal property until further order of the court is sufficient to prevent a sale of the property in satisfaction of an execution against defendant, even though the execution be in favor of a person not a party to the bill.<sup>26</sup> And the effect of an injunction upon a judgment subsequently obtained in violation thereof is to render such judgment null and void, and proceedings

<sup>22</sup> *Coe v. Knox County Bank*, 10 Ohio St., 412.

<sup>23</sup> *Gutshall v. Salsberry*, Wright, 127.

<sup>24</sup> *Johnson v. Connecticut Bank*,

21 Conn., 148.

<sup>25</sup> *Trust Co. v. Weaver*, 102

Tenn., 66, 50 S. W., 763.

<sup>26</sup> *West v. Belches*, 5 Munf., 187.



at law for its enforcement may be enjoined.<sup>27</sup> But a judgment will not be enjoined because complainants have instituted another suit at law against the judgment creditors to recover unliquidated damages upon a contract, unless such judgment creditors are shown to be insolvent, or unless other ground exists for believing that the damages to be recovered will not be realized.<sup>28</sup>

§ 143. **Forbearance to principal as ground of injunction in behalf of surety.** It is a well settled principle in equity that the granting of time or other indulgence to a principal debtor in pursuance of a valid agreement to that effect operates as a discharge of the surety.<sup>29</sup> It follows, therefore, that a court of equity will, under such circumstances, interfere to restrain proceedings at law against the surety for the collection of the debt.<sup>30</sup> And where a creditor has entered into an agreement with his principal debtor for forbearance to sue, and afterward and notwithstanding such agreement he obtains judgment against the sureties without their being notified of the contract of indulgence, such judgment will be perpetually enjoined on the application of the sureties.<sup>31</sup>

§ 144. **Judgment against administrator, when enjoined.** The aid of equity may be properly invoked to restrain the enforcement of a judgment against an administrator, the proceedings being had against him in his capacity of administrator, where there are no assets in his hands for its satisfaction.<sup>32</sup> And where an injunction has been allowed in such a case it will be continued until such time as sufficient assets come into the hands of the administrator to satisfy the judgment in whole or in part, reserving to the judgment creditor the right to show such assets by a *sci. fa.*<sup>33</sup>

<sup>27</sup> Collins v. Fraiser, 27 Ind., 477.

<sup>31</sup> Armistead v. Ward, 2 P. & H.,

<sup>28</sup> Boone v. Small, 3 Cranch C. 504.

C., 628.

<sup>32</sup> Haydon v. Goode, 4 Hen. &

<sup>29</sup> 2 Story's Eq., § 883; Clarke v. M., 460.

Henty, 3 Y. & C., 187.

<sup>33</sup> Id.

<sup>30</sup> 2 Story's Eq., § 883, and cases cited.

§ 145. **Effect of statute requiring payment of judgment into court.** Where it is provided by statute that no injunction shall issue on the application of defendant to stay proceedings at law in a personal action after verdict or judgment, unless the amount of the verdict or judgment be paid into court, such statute applies as well to a bill of interpleader which prays an injunction as to other cases.<sup>34</sup> Nor is such statute limited in its operation and effect to the same suit in which the judgment is recovered, its true intent being that one who has obtained a judgment shall not be hindered in any proceedings which he may afterward take for its enforcement, whether by another suit upon the judgment or otherwise.<sup>35</sup>

§ 146. **Failure to answer material charge; agreement by third person to pay execution.** Where in a suit for an injunction against a judgment defendant fails to answer a most material charge in the bill, and one on which complainant's equity mainly depends, such admission will be taken as a tacit acknowledgment of the equity of the bill. In such case the relief is properly granted as upon a bill *pro confesso*.<sup>36</sup> But an agreement by a third person, not a party to the record, with the judgment debtor, that he will pay the execution does not constitute sufficient ground to warrant an injunction against the execution.<sup>37</sup>

§ 147. **Judgment upon bonds for purchase money, injunction refused.** A purchaser at a sale made by a trustee under a trust to pay debts, who is also one of the creditors secured in the trust, and who gives a bond for the payment of the purchase money of the property purchased by him at such sale, can not enjoin the collection of a judgment upon such bond merely because he is a creditor to a larger amount than

<sup>34</sup> *Morris C. & B. Co. v. Bartlett*,  
2 Green Ch., 9.

<sup>36</sup> *Page's Ex'r v. Winston's*  
Adm'r, 2 Munf., 298.

<sup>35</sup> *Kinney v. Ogden's Adm'r*, 2  
Green Ch., 168.

<sup>37</sup> *Triplett v. Turner*, 2 J. J.  
Marsh, 476.

he is a debtor, since this would defeat the very object of the trust, which is to secure the creditors.<sup>38</sup>

§ 148. **Judgments against city, when enjoined.** An injunction has sometimes been allowed to restrain the enforcement of an execution which was unauthorized and prohibited by positive law. Thus, where under the laws of the state the issuing of writs of execution against a city is prohibited, another method being provided for satisfying judgments against the city, the seizure and sale of the city's property under execution may be restrained.<sup>39</sup> And when a judgment creditor of a city has received a check or warrant in payment of his judgment, which he has indorsed to a third person, he may be enjoined from proceeding with the enforcement of his judgment until the return of such warrant.<sup>40</sup>

§ 149. **Defiance of court, effect of.** The action of a judgment creditor who places himself in an attitude of hostility and defiance toward the court concerning his judgment would seem, in some instances, to lend additional weight to an application for an injunction against further proceedings under the judgment. For example, when plaintiff in a judgment, in defiance of an order of the court dismissing his levy under execution, is proceeding to sell the property levied upon, he may be enjoined from so doing.<sup>41</sup> So when plaintiff in an action at law has been enjoined from proceeding with his suit, but in violation of the injunction he proceeds with his suit and recovers judgment, it is held that, equity having taken jurisdiction of the entire matter in controversy upon the bill for injunction, complainant in that suit is entitled, *prima facie*, to have the judgment perpetually enjoined, unless defendant can show cause to the contrary.<sup>42</sup>

<sup>38</sup> Capehart v. Etheridge, 63 N. C., 353.

<sup>39</sup> City of New Orleans v. Ruleff, 23 La. An., 708; City of New Orleans v. Smith, 24 La. An., 405.

<sup>40</sup> City of New Orleans v. Smith, 24 La. An., 405.

<sup>41</sup> Scogin v. Beall, 50 Ga., 88.

<sup>42</sup> Patterson v. Gordon, 3 Tenn. Ch., 18.

§ 150. **When sheriff not enjoined because of writ of error.** It has been held that a sheriff should not be enjoined from selling under execution upon the ground that proceedings have been taken to reverse the judgment on error, and a bond staying proceedings in the court below has been duly filed and approved, when it is not shown that the sheriff had any knowledge or information concerning the proceedings staying the execution of process, since he should be informed of what has been done before subjecting him to the vexation and costs of a suit.<sup>43</sup>

§ 151. **Arrangement between judgment debtors, effect of; transfer of judgment by creditor.** The fact that judgment debtors have, as between themselves, effected an arrangement by which the property of one should be turned out in satisfaction of the execution, and that he should be indemnified therefor, affords no ground for enjoining the enforcement of execution against the property of the other debtor, even though plaintiffs in the execution were informed of the arrangement.<sup>44</sup> Nor does the transfer of the judgment by the judgment creditor, without notice to the debtor, afford any ground for restraining the collection of the judgment.<sup>45</sup>

§ 152. **Guardianship.** Where money due to a minor child is paid to the mother of the child, and is expended for its necessary support, and a legal guardian is afterward appointed who brings suit against the person who made such payment, and obtains judgment, he may be restrained from collecting such judgment until the taking of an account as to the amount due from the ward's estate to the mother for such expenditures.<sup>46</sup> And where, under the laws of the state, a person is adjudicated an habitual drunkard, and a guardian is appointed of his person and estate, and judgment is afterwards

<sup>43</sup> *Jaedicke v. Patrie* 15 Kan., 287.

<sup>45</sup> *Walker v. Villavaso*, 26 La. An., 42.

<sup>44</sup> *Boyce v. Woods*, 37 Tex., 245.

<sup>46</sup> *Southwestern R. Co. v. Chapman*, 46 Ga., 557.

obtained against him upon a cause of action accruing subsequent to the appointment of such guardian, the enforcement of such judgment may be enjoined at the suit of the guardian.<sup>47</sup>

§ 153. **Joinder of parties.** As regards the joinder of parties to an action for an injunction, it is held that where one of several co-defendants in a joint judgment institutes proceedings in equity for the purpose of having the judgment enjoined, the other defendants should be made parties to the cause, or sufficient reason for their omission should be shown. And an omission in this respect affords good ground for demurrer to the bill.<sup>48</sup> But one of two joint obligors in a promissory note has been allowed an injunction to restrain the enforcement of a judgment recovered against him alone in a suit brought against the two.<sup>49</sup>

§ 154. **Second execution pending appeal from injunction may be enjoined.** When an appeal is taken from an order dissolving an injunction against an execution, and the appeal, under the rules and practice of the court, operates to restore the injunction, but another execution is issued upon the same judgment pending the appeal, it is competent for the court below to entertain another bill to enjoin the last execution. And this is so, although the suing out of the last execution was clearly a contempt of court, and punishable by process for contempt.<sup>50</sup>

§ 155. **Injunction as between holder and indorser of note.** Where the holder of a promissory note, pending an appeal by one of the makers from a judgment recovered upon the note, obtains judgment against the indorser and then dismisses the appeal suit, whereby the indorser loses the benefit of the security upon the appeal to which he would be entitled upon payment of the judgment, sufficient ground is presented

<sup>47</sup> Devin v. Scott, 34 Ind., 67.

<sup>50</sup> Balkum v. Harper's Adm'r,

<sup>48</sup> Gates v. Lane, 44 Cal., 392.

50 Ala., 372.

<sup>49</sup> Anstell v. McLarin, 51 Ga., 467.



for granting an injunction until the hearing, the answer of defendant only denying the allegations of the bill upon information.<sup>51</sup>

§ 156. **Execution against defaulting tax collector not enjoined.** A court of equity will not interfere to prevent the collection of an execution against a defaulting tax collector and his sureties, since if the parties aggrieved are entitled to any judicial interference in such a case, their remedy at law is as ample and complete as they could have in equity.<sup>52</sup>

§ 157. **Judgments in criminal proceedings not enjoined.** In accordance with the well established doctrine of equity denying relief by injunction in matters of a criminal nature, or affecting the criminal laws, an injunction will not be allowed to prevent the enforcement of a judgment imposing a fine and costs for violation of a criminal law of the state.<sup>53</sup> Nor will a court of equity enjoin the collection of an execution for costs against an unsuccessful party to a criminal prosecution.<sup>54</sup>

§ 158. **Mechanics' lien proceedings.** Courts of equity will sometimes interfere for the protection of a mechanic's lien, if it is apparent through the conduct of creditors who have obtained subsequent liens, that there is danger of impairing the rights of the mechanic or material-man. Thus, where such lien has been secured in accordance with statute for the erection of a building upon leased ground, an injunction will be allowed to prevent the removal of the building by a judgment creditor whose judgment is subsequent to the lien, the security being insufficient without such building.<sup>55</sup> But a sale under a prior mechanic's lien will not be enjoined at the suit of a junior lien-holder, especially when he had notice of such prior lien.<sup>56</sup>

<sup>51</sup> *Lewis v. Armstrong*, 47 Ga., 289. See *Burch v. Dooley*, 123 Ind., 288, 24 N. E., 110.

<sup>52</sup> *Gunby v. Bell*, 40 Ga., 133.

<sup>55</sup> *Barber v. Reynolds*, 33 Cal.,

<sup>53</sup> *Joseph v. Burk*, 46 Ind., 59.

497.

<sup>54</sup> *Gault v. Wallis*, 53 Ga., 675.

<sup>56</sup> *Winn v. Henderson*, 63 Ga., 365.

§ 159. **Injunction to restrain sheriff from paying money, bond required.** An injunction restraining a sheriff from paying over money realized upon a levy is regarded as substantially the same in its effects as one restraining proceedings at law. In order, therefore, to warrant such an injunction, the same statutory bond or deposit should be required before issuing the writ as is required in the case of an injunction against proceedings at law.<sup>57</sup>

§ 160. **Sale of good-will of business, violation of agreement concerning.** Where a judgment has been obtained for the purchase price of the good-will of a trade or business, proceedings under the judgment will not be enjoined because of a violation of the vendor's undertaking not to carry on the same business, but the parties will be left to an action at law for damages.<sup>58</sup>

§ 160 a. **Assignee of chose in action.** The assignee of a *chose in action* can not enjoin the enforcement of a judgment based thereon and obtained by the assignor against the debtor who had notice of the assignment, since the recovery of the judgment by the assignor can in no way affect the assignee's rights and constitutes no defense to a suit by the assignee against the debtor.<sup>59</sup>

§ 161. **Judgment on dismissal of injunction bill.** Where on the dismissal of an injunction bill filed to restrain proceedings under a judgment a decree has been rendered against complainant and his sureties in the injunction bond, a court of equity will not interfere with the proceedings, even though the original judgment, to enjoin the execution of which the bill was filed, has been set aside by the court in which it was rendered.<sup>60</sup> And a bill to enjoin defendant from asking judg-

<sup>57</sup> *Boker v. Curtis*, 2 Edw. Ch., 111. peared that the enforcement of the judgment by the assignor would exhaust the debtor's property.

<sup>58</sup> *Shackle v. Baker*, 14 Ves., 468.

<sup>59</sup> *Perry v. Thompson*, 108 Ala., 586, 18 So., 524. As to the right *quære*.

<sup>60</sup> *Blythe v. Peters*, 3 Yerg., 378. to the injunction where it ap-

ment and taking out execution upon an injunction bond after the dissolution, is a proceeding entirely unknown to equity practice, and can not be supported either on principle or authority.<sup>61</sup>

§ 162. **Injunction dissolved on answer denying bill; new trial at law; newly discovered evidence.** With reference to the dissolution of injunctions against judgments at law, the same general rule prevails as in other cases, and the injunction will, in general, be dissolved on filing an answer denying the equity of the bill.<sup>62</sup> And where an injunction has been improperly granted against proceedings under a judgment and a new trial has been allowed, the writ may be dissolved without awaiting a verdict in the second trial at law.<sup>63</sup> Where, however, it appears that since the judgment was enjoined facts have arisen which would make the issuing of a new injunction necessary in case of the dissolution of the first, it will not be dissolved, even though improvidently issued in the first instance.<sup>64</sup>

§ 163. **Damages upon dissolution.** In general upon a dissolution damages will be allowed only as to so much of the judgment as remains due and the collection of which was delayed by the injunction.<sup>65</sup> But where the whole of a judgment has been enjoined for a sum claimed to be due the judgment debtor from the creditor, bearing an insignificant proportion to the amount of the judgment, the injunction will be dissolved with heavy damages.<sup>66</sup>

§ 164. **Effect of dissolution; when decree for amount of judgment erroneous.** The effect of dissolving an injunction against proceedings under a judgment at law is to remove all

<sup>61</sup> *McReynolds v. Harshaw*, 2 Ired. Eq., 195.

<sup>62</sup> *Parkinson v. Trousdale*, 3 Scam., 367; *Hayzlett v. McMillan*, 11 West Va., 464; *Rice v. Tobias*, 83 Ala., 348, 3 So., 670.

<sup>63</sup> *Vass v. Magee*, 1 Hen. & M., 2.

<sup>64</sup> *Exnicios v. Weiss*, 3 Mart. N. S., 480.

<sup>65</sup> *Southerland v. Crawford*, 2 J. Marsh., 370.

<sup>66</sup> *Barrow v. Robichaux*, 15 La. An., 70.

barriers preventing the enforcement of the judgment. Execution may therefore issue immediately upon the dissolution, and it is not necessary to obtain leave of the court for that purpose.<sup>67</sup> But it is held that it is erroneous for a court of equity upon dissolving an injunction against a judgment at law, to enter a decree for the amount of the judgment.<sup>68</sup> So where a bill to enjoin a judgment is dismissed upon the ground that the complainant has an adequate remedy at law against the judgment, it is erroneous to enter a decree for the amount of the judgment, since this is, in effect, to deprive him of the remedy, the existence of which is the reason for refusing equitable relief.<sup>69</sup>

<sup>67</sup> *Young v. Davis*, 1 Monr., 152. made of the proceeding enjoined,

<sup>68</sup> *Duncan v. Morrison*, Breese see *Raymond v. Conger*, 51 Tex., (Ill.), 113; *Hubbard v. Hobson*, 536.

*Ib.*, 147. As to the proper practice in disposing of an injunction against a judgment at law in Texas, and as to the disposition to be <sup>69</sup> *Railway Co. v. Ryan*, 31 West Va., 364, 6 S. E., 924, 13 Am. St. Rep., 865; *Howell v. Thomason*, 34 West Va., 794, 12 S. E., 1088.

## II. DEFENSE AT LAW.

- § 165 Judgment not enjoined where defense could have been made at law.
166. Illustration of the rule; judgment against conscience not necessarily enjoined.
167. The rule further illustrated; absence of witnesses.
168. Failure of proof upon trial insufficient.
169. Failure to defend; threats of bodily harm; instructing counsel to defend.
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172. The general rule applied to decrees in equity.
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174. Exception to rule when defendant not served with process.
175. Execution not enjoined when relief available by application to same court.
176. Sale under execution not enjoined because of conflict among creditors.
177. Two executions on same judgment; premature execution; execution without judgment.
178. Negligence in defending at law a bar to injunction.
179. Judgment not enjoined upon grounds which were urged as a defense at law.
180. The rule further illustrated.
181. Neglect of party or counsel; discharge in bankruptcy.
182. Further applications of the rule.
183. Exceptions to the rule.
184. Exception when equities can not be asserted at law.
185. Effect of insanity or derangement.
186. Prior jurisdiction of equity.
187. Assignee of note.
188. Court itself will not take notice of failure to defend at law.
189. Sickness of defendant; coverture.

§ 165. Judgment not enjoined where defense could have been made at law. A general rule underlying the entire jurisdiction of equity to restrain proceedings at law is, that where the person aggrieved has had an opportunity of interposing



his defense at law and has had his day in court, but has failed through carelessness or inadvertence to avail himself of the opportunity of interposing such defense at law, he can not afterward make it the ground for relief in equity, and is barred from enjoining proceedings under the judgment. It is not the policy of the law to permit persons to slumber upon their rights when they have an opportunity to assert them in a court of law and afterward to permit their assertion in a court of equity. In the absence, therefore, of any suggestion of fraud, accident, mistake or surprise, and when no good reason is shown why the defense was not made at law, the injunction will not be allowed where it is not obviously against conscience to enforce the judgment.<sup>1</sup>

<sup>1</sup> *Marine Insurance Co. v. vis v. Bayliss*, 51 Iowa, 435; *Hodgson*, 7 Cranch, 332; *Hendrickson v. Hinckley*, 17 How., 443; *Emerson v. Udall*, 13 Vt., 477; *Pettes v. Bank of Whitehall*, 17 Vt., 435; *Clute v. Potter*, 37 Barb., 199; *Windwart v. Allen*, 13 Md., 196; *Bateman v. Willoe*, 1 Sch. & Lef., 201; *Commissioners, etc. v. Patrick, Sm. & M. Ch.*, 110; *Lafon v. Desessart*, 1 Mart. N. S., 71; *Meredith v. Benning*, 1 Hen. & M., 585; *Turpin v. Thomas*, 2 Hen. & M., 139; *Stanard v. Rogers*, 4 Hen. & M., 438; *Benton v. Roberts*, 3 Rob. (La.), 224; *Ponder v. Cox*, 26 Ga., 485; *McCook v. Bernd Brothers*, 79 Ga., 391; *Beaird v. Foreman*, Breese, 303; *Gott v. Carr*, 6 G. & J., 309; *Ewing v. Nickle*, 45 Md., 413; *Stilwell v. Carpenter*, 59 N. Y., 414, reversing *S. C.*, 1 Thomp. & C., 615; *Meniffee v. Myers*, 33 Tex., 690; *Shields v. McClung*, 6 West Va., 79; *O'Connor v. Sheriff*, 30 La. An., 441; *Jones v. Cameron*, 81 N. C., 154; *Beaudry v. Felch*, 47 Cal., 183; *Da-*

*vis v. Bayliss*, 51 Iowa, 435; *Abrams v. Camp*, 3 Scam., 290; *Lucas v. Spencer*, 27 Ill., 15; *Albro v. Dayton*, 28 Ill., 325; *Shricker v. Field*, 9 Iowa, 366; *Wilsey v. Maynard*, 21 Iowa, 107; *Kersey v. Rash*, 3 Del. Ch., 321; *Weems v. Weems*, 73 Ala. 462; *Hines v. Beers* 76 Ga., 9; *Noble v. Butler*, 25 Kan., 645; *Alleman v. Kight*, 19 West Va., 201; *Ashton v. Jones*, 14 Neb., 426; *Hanna v. Morrow*, 43 Ark., 107; *Proctor v. Pettitt*, 25 Neb., 96; *Foshee v. McCreary*, 123 Ala., 493, 26 So., 309; *Rucker v. Langford*, 138 Cal., 611, 71 Pac., 1123; *Redwine v. McAfee*, 101 Ga., 701, 29 S. E., 428; *Carney v. Village of Marseilles*, 136 Ill., 401, 26 N. E., 491, 29 Am. St. Rep., 328; *Harding v. Hawkins*, 141 Ill., 572, 31 N. E., 307, 33 Am. St. Rep., 347; *Losey v. Neidig*, 52 Neb., 167, 71 N. W., 1067; *Waldo v. Denton*, 135 Pa. St., 181, 19 Atl., 1078; *Ballow v. Wichita County*, 74 Tex., 339, 12 S. W., 48; *Melton v. Lewis*, 74 Tex., 411, 12 S. W., 93; *Good-*

§ 166. **Illustration of the rule; judgment against conscience not necessarily enjoined.** In illustration of the general rule laid down in the preceding section, that equity will not afford relief where an opportunity has been had of interposing the defense at law, it may be said that even where it is manifest that great hardship has been done the defendant at law by the judgment rendered against him, still if such hardship does not result from any fraud or surprise on the part of plaintiff, but is merely the result of negligence in making proper

man *v.* Henley, 80 Tex., 499, 16 S. W., 432; *Spokane Coop. M. Co. v. Pearson*, 28 Wash., 118, 68 Pac., 165; *Tompkins v. Drennen*, 6 C. C. A., 83, 56 Fed., 694; *Edmanson v. Best*, 6 C. C. A., 471, 57 Fed., 531. But see, *contra*, *Boyce's Ex'rs v. Grundy*, 3 Pet., 210. In *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, the law upon this subject is well laid down by Chief Justice Marshall, as follows: "Without attempting to draw any precise line to which courts of equity will advance, and which they can not pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defense can not be set up in equity

which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law. In the case under consideration the plaintiffs ask the aid of this court to relieve them from a judgment, on account of a defense which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants, or by any pure and unmixed accident, from making at law. It will not be said that a court of chancery can not interpose in any such case. Being capable of imposing its own terms on the party to whom it grants relief, there may be cases in which its relief ought to be extended to a person who might have defended, but has omitted to defend himself at law. Such cases, however, do not frequently occur. The equity of the applicant must be free from doubt. The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself. The court is of opinion that this is not such a case." *Emerson v. Udall*, 13 Vt., 477, was a bill in chancery to restrain the enforce-

defense at law, relief against the judgment will be refused.<sup>2</sup> Nor will the relief be granted upon the ground that complainant was ignorant of his defense to the action at law where, by the exercise of reasonable diligence, he could have learned of its existence.<sup>3</sup> Nor will equity enjoin a sale under execution upon the ground that the execution is void when ample remedy may be had by an action of trespass against the officer making the levy.<sup>4</sup> And the fact that the enforcement of a judgment would be against conscience, will not, of itself, warrant an injunction; however unjust and unconscionable the demand may be on which judgment was ob-

ment of a judgment founded upon an award of arbitrators. The grounds relied upon were that the original claim was groundless, that the arbitrators exceeded the scope of their authority, and that complainant had not sufficient notice of the time and place of hearing before the arbitrators. The decision of the chancellor dismissing the bill was affirmed, Redfield, J., saying: "It is now, I apprehend, well settled, that a court of equity will not examine into the foundation of the judgment of a court of law, upon any ground which either *was tried* or *might have been tried* in the court of law. The judgment of a court of law is conclusive upon all the world as to all matters within its cognizance. If a party fail there by not presenting his defense, when he should have done it, he can have no redress in a court of equity; much less can he expect relief in a court of equity, when he has had a full trial at law upon the very grounds which he now wishes to urge anew. For a court

of equity to grant relief in any such case, would be to sit as a court of errors upon the proceedings of the courts of common law, which would be a very invidious, as well as a very unwarrantable assumption. Equity has sometimes interfered to grant relief, when a party, by accident or mistake, without his own default, or by the fraud of the opposite party, has failed of an opportunity to present his defense. So, too, when the ground of defense was exclusively of an equitable character, and such as would not avail the party at law. Beyond this, I know of no good ground upon which a court of equity could interfere to enjoin the party from pursuing a judgment at law."

<sup>2</sup> Tapp v. Rankin, 9 Leigh, 478; Field v. McKinney, 60 Miss., 763.

<sup>3</sup> Harding v. Hawkins, 141 Ill., 572, 31 N. E., 307, 33 Am. St. Rep., 347; Spokane Coop. M. Co. v. Pearson, 28 Wash., 118, 68 Pac., 165.

<sup>4</sup> Munis v. Herrera, 1 New Mex., 362.

tained, if through neglect or carelessness no defense was interposed at law, relief will not be granted in equity.<sup>5</sup> So where defendant in the action at law, relying upon the statement of the clerk of the court that no suit was pending against him, made no further inquiry and failed to take any steps to defend, he was not allowed to enjoin the judgment.<sup>6</sup> So equity will not, in the absence of fraud or collusion, enjoin the collection of a judgment against a municipal corporation, at the instance of a taxpayer, upon the ground that the municipality had a good defense to the action in which the judgment was rendered.<sup>7</sup> And where the complainant had a good defense at law but failed to set it up by a sufficient plea or answer, the relief should be denied.<sup>8</sup>

§ 167. **The rule further illustrated; absence of witnesses.** Where it plainly appears that the equities on which complainant asks for relief against a judgment might have availed him in a plea of *non est factum* in the action at law, and no excuse appears for his not so defending at law, the injunction will be refused.<sup>9</sup> Nor is it any ground for relief against the judgment that the pleas interposed by defendant to the action at law were held unsupportable, since the proper remedy is by revising the decision of the court of law, rather than by resorting to equity.<sup>10</sup> So the absence of a material witness, upon the trial at law, affords no ground for enjoining the judgment, since the court of law had ample powers

<sup>5</sup> Ponder v. Cox, 26 Ga., 485.

<sup>6</sup> Hanna v. Morrow, 43 Ark., 107.

<sup>7</sup> Carney v. Village of Marseilles, 136 Ill., 401, 26 N. E., 491, 29 Am. St. Rep., 328.

<sup>8</sup> Melton v. Lewis, 74 Tex., 411, 12 S. W., 93.

<sup>9</sup> Harden v. Garden, 7 Leigh, 157; Mershon v. Bank of the Commonwealth, 6 J. J. Marsh., 438. But in Spotswood v. Higgenbotham, 6 Munf., 313, the relief was granted

against a judgment upon a bail bond upon the ground that the defendant had not executed the bond, and that, therefore, he had regularly no day in court, and was not bound to take any steps in the action at law. The case is clearly against the weight of authority, since the plea of *non est factum* would have been a sufficient defense to the action.

<sup>10</sup> Moore v. Dial, 3 Stew., 155.

to give relief by a continuance, or a new trial, and even though it refused so to do, equity will not revise and correct the errors of courts of law.<sup>11</sup> Nor will the fact that defendant in the original action was unable to establish his defense, owing to the unexpected absence of the plaintiff, whom he had not called as a witness, warrant a court of equity in enjoining the judgment in the absence of fraud.<sup>12</sup>

§ 168. **Failure of proof upon trial insufficient.** Failure of proof upon the trial at law will not, in the absence of fraud, accident, mistake, or other adventitious circumstances, warrant a court of equity in granting relief against the judgment. Thus, where complainant asks an injunction against a judgment, alleging in his bill that he is now able to prove the matter of his plea in defense of the action at law, which he was unable to prove upon the trial, but does not suggest fraud, accident, mistake, or other circumstances as the cause of such failure of proof, the injunction will not be allowed.<sup>13</sup> So if the failure or omission to prove facts material to the defense was caused by the advice of counsel, equity will not relieve against the judgment.<sup>14</sup> And general allegations of difficulty in procuring vouchers and of unavoidable delay in settling accounts are not sufficient to warrant the interposition of equity.<sup>15</sup>

§ 169. **Failure to defend; threats of bodily harm; instructing counsel to defend.** An injunction will not be allowed to restrain the enforcement of a judgment, or to declare it invalid, because of a defect of which the person complaining had knowledge during the pendency of the suit, but of which he failed to avail himself at that time.<sup>16</sup> Nor will the injunction be granted on the ground that the defendant at law had

<sup>11</sup> *Chapman v. Scott*, 1 Cranch C. C., 302.

<sup>15</sup> *Wilson v. Bastable*, 1 Cranch C. C., 394.

<sup>12</sup> *Wilder v. Lee*, 64 N. C., 50.

<sup>16</sup> *Wilsey v. Maynard*, 21 Iowa,

<sup>13</sup> *Norris v. Hume*, 2 Leigh, 334. 107.

<sup>14</sup> *Fentress v. Robins*, N. C.

Term R., 177.



a good and sufficient defense to the action, but was kept from attendance at court by threats of bodily harm, it not appearing that he made any efforts to be defended by counsel.<sup>17</sup> Nor is it a sufficient excuse for neglecting to make defense at law that the defendant wrote to counsel to interpose a defense, but that his letter arrived too late for this purpose, and where this is the only equity relied upon, a court of chancery will not interpose.<sup>18</sup>

§ 170. **Usury; maintenance; infancy; payment; public business; false testimony.** Allegations in the bill of usury in the contract upon which judgment was obtained, will not avail in procuring an injunction, since the usury would have been a good and sufficient defense to the original action before judgment obtained.<sup>19</sup> So an injunction will not be granted to restrain proceedings under a verdict upon the ground of maintenance in the proceedings resulting in the judgment, since the question of maintenance is one properly to be determined by a court of law.<sup>20</sup> Nor will the relief be allowed upon the ground that defendant was a minor, since such defense might have been interposed at law; and where one has slept upon his legal rights until they are barred by the statute of limitations, he is estopped from relief in equity.<sup>21</sup> So judgment on a note will not be restrained on the ground that payment had been made upon the note with which the judgment debtor was not credited, it not appearing that he had made any effort to establish the fact of payment in the action at law.<sup>22</sup> And, generally, it may be said that where defendant in the action at law had any defense in bar of the action, which he neglected to interpose in the legal forum, he will not receive the aid of equity in restraining the judgment.<sup>23</sup> Nor in

<sup>17</sup> *Duncan v. Gibson*, 45 Mo., 352.

<sup>20</sup> *Elborough v. Ayres*, L. R. 10

<sup>18</sup> *Stanard v. Rogers*, 4 Hen. & M., 438.

Eq., 367.

<sup>19</sup> *Lansing v. Eddy*, 1 Johns. Ch.,

<sup>21</sup> *Clark v. Bond*, Wright, 282.

49.

<sup>22</sup> *Commissioners v. Patrick*, Sm. & M. Ch., 110.

<sup>23</sup> *Windwart v. Allen*, 13 Md., 196.

the application of the rule does it matter whether the judgment which is sought to be enjoined was obtained by default or upon a verdict.<sup>24</sup> And proceedings under a judgment will not be enjoined on the ground that the defendant in the action at law, being engaged in public business, was precluded from attending at the trial.<sup>25</sup> Nor will the relief be granted because the verdict was found upon the testimony of one witness who had been suborned to swear falsely, nor because the court of final resort had refused a new trial.<sup>26</sup>

§ 171. **Action for tort; bill should show why defense not made at law.** Equity will not interfere to restrain a judgment at law in an action for a tort where the equities relied upon as the foundation of the bill might have been interposed as a defense to the action at law; and especially will the interference be denied when a new trial has been refused at law.<sup>27</sup> Nor will the relief be granted upon grounds which were urged in defense of the action at law.<sup>28</sup> And where a bill is filed for an injunction in a case where complete relief might have been had by defending at law, the bill must clearly show why the defense was not asserted in the legal forum.<sup>29</sup>

§ 172. **The general rule applied to decrees in equity.** The general rule under consideration as applicable to judgments at law applies equally to decrees in equity. And a final decree in equity will not be enjoined on grounds of equity existing prior to its rendition, and which might have been relied upon in the original suit unless the equities are such as to authorize a bill of review.<sup>30</sup>

<sup>24</sup> *Turpin v. Thomas*, 2 Hen. & M., 139.

<sup>25</sup> *Smith v. Lowry*, 1 Johns. Ch., 320.

<sup>26</sup> *Id.*

<sup>27</sup> *Meredith v. Benning*, 1 Hen. & M., 585. And see as to the relief where a new trial has been de-

nied at law, *Smith v. Lowry*, 1 Johns. Ch., 320.

<sup>28</sup> *Bachelder v. Bean*, 76 Me., 370.

<sup>29</sup> *Yancy v. Fenwick*, 4 Hen. & M., 423.

<sup>30</sup> *Moran v. Woodyard*, 8 B. Mon., 537.

§ 173. **Judgment not enjoined when remedy by appeal available; rule not applicable where no appeal exists.** The general doctrine under discussion, denying relief by injunction against the enforcement of a judgment when adequate relief might be had at law, finds frequent illustration in cases where the extraordinary aid of this writ is invoked to restrain proceedings under a judgment from which full and complete relief might be had in the usual course of procedure by appeal. And upon this point the rule is well established that courts of equity will not lend their aid by injunction against the enforcement of judgments when a sufficient remedy exists by appeal or writ of *certiorari* to revise the proceedings at law. A plain, adequate and specific remedy existing by appeal, he who is dissatisfied with a judgment must pursue that remedy, and will be denied relief by injunction when no sufficient reason is shown why the remedy at law is not pursued.<sup>31</sup> Thus, a defendant in a judgment who fails to appeal therefrom, or to join in an appeal taken by plaintiff, thereby acquiescing in

<sup>31</sup> Manning v. Hunt, 36 Tex., 118; Galveston, H. & S. A. R. Co. v. Ware, 74 Tex., 47, 11 S. W., 918; Texas-Mexican R. Co. v. Wright, 88 Tex., 346, 31 S. W., 613, 31 L. R. A., 200; Palmer v. Gardiner, 77 Ill., 143; Village of Dolton v. Dolton, 201 Ill., 155, 66 N. E., 323; Savoie v. Thibodaux, 29 La. An., 51; Schwab v. City of Madison, 49 Ind., 329; De Haven v. Covalt, 83 Ind., 344; Parsons v. Pierson, 128 Ind., 479, 28 N. E., 97; Naughton v. Dinkgrave, 25 La. An., 538; Foshee v. McCreary, 123 Ala., 493, 26 So., 309; Shaul v. Duprey, 48 Ark., 331, 3 S. W., 366; Wingfield v. McLure, 48 Ark., 510, 3 S. W., 439; Ward v. Derrick, 57 Ark., 500, 22 S. W., § 1; Fuller v. Townsley Co., 58 Ark., 314, 24 S. W., 635; Hollenbeak v. McCoy, 127 Cal., 21, 59 Pac., 201; Schilling v. Reagan, 19 Mont., 508, 48 Pac., 1109; Beck v. Frausham, 21 Mont., 117, 53 Pac., 96; Alexander v. Fransham, 26 Mont., 496, 68 Pac., 945; Langley v. Ashe, 38 Neb., 53, 56 N. W., 720; Mayer v. Nelson, 54 Neb., 434, 74 N. W., 841; Bowman v. McGregor, 6 Wash., 118, 32 Pac., 1059; Eidemiller v. Elder, 32 Wash., 605, 73 Pac., 687; Railway Co. v. Ryan, 31 West Va., 364, 6 S. E., 924, 13 Am. St. Rep., 865; Shay v. Nolan, 46 West Va., 299, 33 S. E., 225; Edmanson v. Best, 6 C. C. A., 471, 57 Fed., 531. See, also, Hopkins v. Medley, 99 Ill., 509. But see Tobriner v. White, 19 App. D. C., 163. And in Tennessee a contrary doctrine would seem to prevail. See Williams v. Pile, 104 Tenn., 273, 56 S. W., 833.

the judgment which is affirmed on the appeal taken by plaintiff, can not afterward enjoin the enforcement of the judgment.<sup>32</sup> So an order of seizure and sale of property will not be enjoined because of insufficiency of the evidence upon which the order was based, but the party aggrieved will be left to pursue his remedy by appeal from the order.<sup>1</sup> Indeed, upon an application for an injunction to restrain the enforcement of a judicial order the court will not entertain any question as to the sufficiency of the evidence to authorize the order, since the remedy upon that point must be sought by appeal from the action of the court complained of, instead of by injunction.<sup>2</sup> So equity will not enjoin a judgment in attachment or garnishment upon the ground that no affidavit was filed,<sup>3</sup> or that the judgment was rendered for an amount greater than that named in the affidavit,<sup>4</sup> since such errors may be redressed on appeal. Nor will equity enjoin the enforcement of a judgment rendered against complainant by a subordinate court, imposing a fine for violation of a city ordinance, upon the ground of insufficiency of the proceedings to warrant the judgment, when there is a plain, adequate and sufficient remedy by appeal from the action of the inferior court.<sup>5</sup> So if sufficient relief could have been had by appeal from the judgment, but the party aggrieved has been negligent in prosecuting his appeal and has thereby lost his remedy, he will be denied relief by injunction against the judgment.<sup>6</sup> So, too, a judgment debtor who has lost his remedy by appeal by reason of a defect in his own proceedings will not be allowed to enjoin the judgment.<sup>7</sup> And where

<sup>32</sup> *Savoie v. Thibodaux*, 29 La. An., 51.

<sup>1</sup> *Naughton v. Dinkgrave*, 25 La. An., 538.

<sup>2</sup> *City of Shreveport v. Flournoy*, 26 La. An., 709.

<sup>3</sup> *Hart v. O'Rourke*, 151 Ind., 205.  
51 N. E., 330.

<sup>4</sup> *Gum-Elastic R. Co. v. Mexico P. Co.*, 140 Ind., 158, 39 N. E., 443.

30 L. R. A., 700.

<sup>5</sup> *Schwab v. City of Madison*, 49 Ind., 329.

<sup>6</sup> *Palmer v. Gardiner*, 77 Ill., 143.

<sup>7</sup> *Long v. Smith*, 39 Tex., 160.

the complainant has appealed from a judgment rendered by a justice of the peace, the refusal of the latter to approve the appeal bond is no ground for an injunction against the judgment. since there is an adequate remedy by *mandamus* against the justice.<sup>8</sup> Where, however, there is no provision under the law for an appeal or other proceeding to review a judgment, or where, for any other reason, an appeal is impossible, the rule can have no application and relief may be granted if the case is in other respects one of equitable cognizance. Thus, where a judgment is for an amount less than that from which an appeal or *certiorari* will lie, the relief is properly granted if the case is in other respects one calling for the interposition of equity.<sup>9</sup> So where a judgment has been rendered in an action against a corporation which is in the hands of a receiver, the latter, not being a party to the action at law, has no remedy by appeal from the judgment and he may therefore resort to equity in the first instance.<sup>10</sup>

§ 174. **Exception to rule when defendant not served with process.** Notwithstanding the general rule as stated and illustrated in the preceding section, denying relief by injunction when an adequate remedy exists by appeal from the judgment, an exception to the rule has been recognized where defendant in the judgment has not been served with process in the action in which the judgment was recovered. And such want of service has been regarded as affording sufficient ground for enjoining the judgment, even though the error be one which would avail on appeal or writ of error, since in such case, it is held, defendant is not obliged to appeal instead of resorting to equity.<sup>11</sup>

<sup>8</sup> *Boyd v. Weaver*, 134 Ind., 266, 33 N. E., 1027.

<sup>10</sup> *Rogers v. Haines*, 114 Ala., 50, 21 So., 411.

<sup>9</sup> *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex., 47, 11 S. W., 918; *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex., 579, 16 S. W., 430.

<sup>11</sup> *Robinson v. Reid's Ex'r*, 50 Ala., 69. For a full discussion of this subject see § 229, *post*.



§ 175. **Execution not enjoined when relief available by application to same court.** Since courts of law exercise a somewhat summary power over their own process, and may in many cases grant complete relief against irregularities in the enforcement of executions upon their judgments merely upon motion or petition, it not unfrequently happens that applications are made for injunctions against executions at law, when ample relief might be had by application to the court in which the judgment was rendered. And the doctrine is well established, that an injunction will not be allowed against an execution at law, to restrain its enforcement and satisfaction, when by application to the court in which the judgment was rendered, upon motion or petition, satisfactory relief may be had.<sup>12</sup> Thus, where the ground relied upon in support of a bill for an injunction against a sale under judgment consists in certain alleged irregularities and defects in the proceedings of the sheriff, which are exclusively within the cognizance of the court from which the execution issued and in which the proceedings were had, and it is entirely competent for that court to give relief by setting aside the sale upon motion, equity will not entertain jurisdiction by injunction.<sup>13</sup> And if, under the practice of the state, there is ample remedy at law for staying the enforcement of an execution, equity will not enjoin, and a bill for an injunction in such case is demurrable, because of the remedy at law.<sup>14</sup> So where relief might have been had by motion to vacate and set aside the judgment itself, its execution will not be

<sup>12</sup> *Mayo v. Bryte*, 47 Cal., 626; *Ore.*, 65, 63 Pac., 824, 84 Am. St. Moulton *v.* Knapp, 85 Cal., 385, 24 Rep., 750; *Ward v. Derrick*, 57 Pac., 803; *Wilson v. Miller*, 30 Md., Ark., 500, 22 S. W., 93; *Crocker v. Allen*, 34 S. C., 452, 13 S. E. 334; *Chambers v. Penland*, 78 N. 650, 27 Am. St. Rep., 831. See also C., 53; *Russell v. O'Dowd*, 48 Ga., Shaul *v.* Duprey, 48 Ark., 331, 3 474; *Cardinal v. Eau Claire L. S. W., 366; Wingfield v. McLure,* Co., 75 Wis., 404, 44 N. W., 761; 48 Ark., 510, 3 S. W., 439.  
<sup>13</sup> *Wilson v. Miller*, 30 Md., 82.  
<sup>14</sup> *Russell v. O'Dowd*, 48 Ga., 474.

restrained.<sup>15</sup> And where it is sought to enjoin a judgment for want of service of process, of which the complainant could have availed himself by a motion to set it aside, it is incumbent upon him to allege and prove that he had no notice or knowledge of the rendition of the judgment before the expiration of the time in which he could have made such a motion in the court where the judgment was rendered.<sup>16</sup> So where the defendant has appealed from a judgment rendered against him but the clerk of the court has refused to approve the *supersedeas* bond, the enforcement of the judgment will not be enjoined, since there is an adequate remedy by application to the court to compel the clerk to do his duty.<sup>17</sup> And where the defendant, having taken an appeal from a judgment, had failed to file his transcript in the upper court within the proper time, relying upon an agreement with the judgment creditor for a settlement of the judgment, and the latter thereupon procures an affirmance of the judgment upon certificate or short record and is proceeding to enforce it, relief will be denied since there was an adequate remedy by motion in the reviewing court to set aside the order of affirmance.<sup>18</sup> But where, after the rendition of a judgment against the defendant, he had an opportunity by application to the court to have the judgment set aside but was induced by the fraudulent representations of the plaintiff not to make his application until it was too late, relief against the execution of the judgment is properly granted.<sup>19</sup> And an injunction may be granted to restrain the enforcement of an execution when the amount actually due the execution creditor is tendered him and is

<sup>15</sup> *Kitzman v. Minn. T. Mfg. Co.*, 10 N. Dak., 26, 84 N. W., 585; *Crist v. Cosby*, 11 Okla., 635, 69 Pac., 885; *Brown v. Chapman*, 90 Va., 174, 17 S. E., 855; *Cowley v. Northern Pacific R. Co.*, 46 Fed., 325.

<sup>16</sup> *Massachusetts B. L. Assn. v.*

*Lohmiller*, 20 C. C. A., 274, 74 Fed., 23.

<sup>17</sup> *Supreme Lodge v. Carey*, 57 Kan., 655, 47 Pac., 621.

<sup>18</sup> *Roebling v. Stevens Co.*, 93 Ala., 39, 9 So., 369.

<sup>19</sup> *Delaney v. Brown*, 72 Vt., 344, 47 Atl., 1067.

brought into court for his use, even though relief might be had by motion in the court from which the execution issued, when defendant appears and answers upon the merits, without raising the question of jurisdiction or mode of proceeding.<sup>20</sup>

§ 176. **Sale under execution not enjoined because of conflict among creditors.** Upon principles similar to those above discussed and illustrated, an injunction will not be allowed against a sale of personal property under execution in a contest between different creditors claiming a right to the property under execution, but the parties aggrieved will be left to their common law remedies, which are regarded as sufficient for such a case.<sup>21</sup> Nor will a sale of personal property under executions be enjoined when there are conflicting claimants asserting their rights under different executions, merely because the bill alleges that the justice of the peace before whom the contest is pending has combined with some of the parties in interest to defeat complainants' right; since a court of equity will not presume that the justice will administer the law improperly, and if he does so administer it his errors should be corrected at law and not in equity.<sup>22</sup>

§ 177. **Two executions on same judgment; premature execution; execution without judgment.** The issuing of two executions upon the same judgment does not authorize the interposition of equity, since the party aggrieved can find sufficient remedy at law. Nor will the fact that an execution has issued prematurely entitle the defendant in execution to have an injunction against it perpetuated, if the judgment creditor would be entitled to another as soon as the first is perpetually enjoined.<sup>23</sup> So where an execution is issued without any legal warrant or authority, there being no judgment or order of court upon which it is based, and it is being levied

<sup>20</sup> *Miller v. Longacre*, 26 Ohio St., 291.      <sup>23</sup> *Elliott v. Elmore*, 16 Ohio, 27; *Dayton v. Commercial Bank*, 6

<sup>21</sup> *Endres v. Lloyd*, 56 Ga., 547.      *Rob. (La.)*, 17.

<sup>22</sup> *Id.*

upon personal property, equity will not interfere by injunction, since the person aggrieved may have full relief for the injury sustained by an action for damages.<sup>24</sup>

§ 178. **Negligence in defending at law a bar to injunction.** It may also be asserted as a general rule that a judgment will not be enjoined because of some defense which was available at law, when it is not shown that the failure to defend at law was attributable to the opposing party, or to something in the nature of accident, and when such failure appears to be the result of want of diligence on the part of him who seeks the relief. Thus, the fact that the consideration for the giving of a promissory note was the purchase of certain real estate, which complainant was induced to buy upon defendant's representations that he could make title to the land, which representations were not made good, will not justify an injunction against a judgment upon the note when such defense might have been urged in the suit upon the note.<sup>25</sup> Nor will a court of equity enjoin a judgment at law upon grounds which, by the use of due diligence, might have been used in defense of the action at law, or where the proceedings in equity for an injunction rest upon a defense which is equally available at law.<sup>26</sup> So a sale under a judicial decree will not be enjoined in behalf of one who was a party to the decree, upon a new bill filed by him for that purpose, when he shows no equity but such as was or might have been urged in the original action before the decree therein.<sup>27</sup>

§ 179. **Judgment not enjoined upon grounds which were urged as a defense at law.** As still further illustrating the general doctrine under discussion, a judgment will not be enjoined merely because it is unjust and oppressive, when defendant in the judgment has had a fair opportunity to be

<sup>24</sup> Davidson v. Floyd, 15 Fla., 667.

<sup>26</sup> County Commissioners v. Bryson, 13 Fla., 281.

<sup>25</sup> Howell v. Motes, 54 Ala., 1.

<sup>27</sup> Brinson v. Wessolowsky, 58 Ga., 293.

heard upon a defense upon which the court of law had complete jurisdiction, even though the court of equity may be of opinion that the court of law acted erroneously.<sup>28</sup> The governing principle in such case is that when a question has been once fully considered and decided by a competent tribunal, it can not be opened to review upon the same facts before another tribunal of merely concurrent powers, without producing an unseemly strife between such courts. And additional reason is found for withholding relief in such case in the fact that courts of equity do not sit in review or in judgment over the errors of courts of law.<sup>29</sup> So, too, the defendant in a judgment recovered in favor of a corporation can not enjoin the enforcement of the judgment upon the ground that the plaintiff was not legally incorporated, when such defense had been interposed in the action, the decision of the court upon that question being *res judicata*.<sup>30</sup>

§ 180. **The rule further illustrated.** When it is sought to enjoin a judgment upon the ground of a good defense to a part of the demand, which came to defendant's knowledge too late to be used in defense of the action, he must show that the failure to urge such defense was unmixed with negligence on his own part, and must also tender or bring into court the amount which is admitted to be due.<sup>31</sup> And a judgment will not be enjoined upon the ground of facts which are alleged to have rested exclusively within the knowledge of plaintiff in the action, and which are charged to be necessary to a fair and

<sup>28</sup> *Holmes v. Steele*, 28 N. J. Eq., 173.

<sup>29</sup> *Holmes v. Steele*, 28 N. J. Eq., 173; *Commercial Union Assurance Co. v. Scammon*, 13 Ill., 627, 23 N. E., 406. But in West Virginia it is held, under the code of that state, that a judgment in an action upon contract may be enjoined by the defendant upon the ground of want of consideration in the con-

tract, although the defendant has failed to interpose such defense to the action, the code affirmatively providing that such failure to defend at law shall not prevent relief in equity. *Ludington v. Tiffany*, 6 West Va., 11. And see *Code of West Virginia*, ch. 126, § 6.

<sup>30</sup> *Mahan v. Accommodation Bank*, 26 La. An., 34.

<sup>31</sup> *Hill v. Harris*, 42 Ga., 412.



just decision at law, when defendant has submitted to trial in the action without availing himself of his right by a bill of discovery to obtain the desired facts.<sup>32</sup> So a court of equity will not enjoin a judgment at law on the ground that it was rendered upon an illegal arrest, an action at law being the appropriate remedy for such a grievance.<sup>33</sup> And especially will the relief be withheld, in such case, when defendant in the action voluntarily appeared and submitted himself to the jurisdiction of the court and confessed judgment.<sup>34</sup>

§ 181. **Neglect of party or counsel; discharge in bankruptcy.** As still further illustrating the general doctrine under discussion, it is to be observed that an injunction will not be allowed against a judgment because of the neglect of a party to the action or of his counsel, when such neglect, if excusable, might, under a statute of the state, be made the foundation of a motion for relief in the original cause.<sup>35</sup> And a judgment debtor will not be allowed to enjoin the judgment because of his discharge in bankruptcy after incurring the obligation on which the action was brought, when he has neglected to avail himself of his discharge, or to plead it in defense of the action.<sup>36</sup> But where the debtor obtains his discharge in bankruptcy after judgment rendered against him upon a cause of action accruing before bankruptcy and provable under the act, the judgment may be enjoined upon his application.<sup>37</sup>

§ 182. **Further applications of the rule.** Where by statute a sheriff has ample remedy at law in case of proceedings brought against him for selling property on execution to which there are conflicting rights, and where he is not obliged to proceed without being indemnified for such damages as he may sus-

<sup>32</sup> *Dilly v. Barnard*, 8 G. & J., 170. See also *Lansing v. Eddy*, 1 Johns. Ch., 49.

<sup>33</sup> *Baldwin v. Murphy*, 82 Ill., 485.

<sup>34</sup> *Id.*

<sup>35</sup> *Borland v. Thornton*, 12 Cal., 440.

<sup>36</sup> *Jones v. Coker*, 53 Miss., 195; *Miller v. Clements*, 54 Tex., 351.

<sup>37</sup> *Earley v. Bledsoe*, 59 Tex., 488.

tain, he will not be permitted to enjoin proceedings at law brought against him for having sold property the title to which is in dispute.<sup>38</sup> It is to be observed, however, that a statute providing for the taking of an indemnifying bond by the officer making a levy does not preclude a third person claiming to be the owner of the property levied upon from his right to an injunction where the remedy at law is incomplete.<sup>39</sup> And a distinction is drawn between the case of one claiming as an incumbrancer and as owner of the property; and while the relief will not be granted in favor of an incumbrancer, the real owner of the property is entitled to protection.<sup>40</sup>

§ 183. **Exceptions to the rule.** To the general rule as laid down in the preceding sections, that equity will not enjoin a judgment at law where the defense might have been urged upon the trial, there are some exceptions resting upon well recognized principles of equity jurisprudence. Most of these exceptions will be found to fall under the heads of fraud, accident, mistake, surprise and ignorance, and will be noticed hereafter in this chapter. It may be said, generally, that where it appears that the courts of law do not afford as safe and convenient a remedy as courts of equity, or where it is doubtful whether, according to the jurisdiction and practice of the common law courts, the defense is legally available there, or, if available, it is attended with difficulty and embarrassment, equity may grant relief against the judgment.<sup>41</sup> So where strong equities exist against the enforcement of a judgment, which, from the nature of the case, could not have been pleaded in defense of the action at law, they may afford ground for restraining the judgment.<sup>42</sup> And the fact that

<sup>38</sup> *Storrs v. Payne*, 4 Hen. & M., Leigh, 85 *Mewborn v. Glass*, 5 Humph., 520; *Cornelius v. Mor-*

<sup>39</sup> *Walker v. Hunt*, 2 West Va., 491. But see *Baker v. Rinehard*, 11 West Va., 238. *sub nom. Cornelius v. Thomas*, 1 Tenn. Ch., 283. And see *Spotswood*

<sup>40</sup> *Walker v. Hunt*, 2 West Va., 491; *Bowyer v. Creigh*, 3 Rand., 25. *v. Higgenbotham*, 6 Munf., 313.

<sup>41</sup> *Crawford v. Thurmond*, 3 605. <sup>42</sup> *Scott v. Shreeve*, 12 Wheat,

the rights in issue are equitable rather than legal in their nature, will afford additional reason for enjoining the proceedings.<sup>43</sup>

§ 184. **Exceptions when equities can not be asserted at law.** It may sometimes happen also that the equities relied upon for an injunction can not be asserted in a court of law, and in such cases a departure from the general rule becomes necessary in order to give complete relief.<sup>44</sup> Thus, where the foundation of a bill to enjoin a judgment is an agreement of such a nature that it could not have been urged in defense of the action at law, equity may properly interfere and enjoin the enforcement of the judgment.<sup>45</sup> So a sale of complainant's personal property under an execution against another person will warrant the interference of equity, where complainant's title to the property is such as to prevent its being followed in the hands of purchasers, and such that an action of trespass can not be maintained against the officers or the plaintiffs in execution.<sup>46</sup> But where a person, not a party to the proceedings at law, asks to enjoin a sale of personal property under an execution on the ground of a prior incumbrance upon the same property, the court will not interfere.<sup>47</sup>

§ 185. **Effect of insanity or derangement.** It may also happen that the peculiar circumstances of a particular case will warrant equity in a departure from the general rule denying relief in cases where the defense should have been urged at law. Thus, it has been held sufficient to warrant a perpetual injunction against a judgment in slander, that at the time the defamatory words were uttered, as well as when

<sup>43</sup> *Crawford v. Thurmond*, 3 Leigh, 85.

<sup>45</sup> *Hibbard v. Eastman*, 47 N. H., 507.

<sup>44</sup> *Hibbard v. Eastman*, 47 N. H., 507; *Anderson v. Biddle*, 10 Mo., 23; *Walker v. Heller*, 90 Ind., 198; *Rollins v. Hess*, 27 West Va., 570. But see, *contra*, *Kerr v. Hill*, 27 West Va., 576.

<sup>46</sup> *Anderson v. Biddle*, 10 Mo., 23.

<sup>47</sup> *Bowyer v. Creigh*, 3 Rand., 25. See also as to incumbrances, *Walker v. Hunt*, 2 West Va., 491.

the judgment was obtained, the person uttering such words was insane or in a state of partial mental derangement on the subject to which the words had reference.<sup>48</sup> Such exceptions, however, resting upon the special circumstances of particular cases, in no way weaken the general rule.

§ 186. **Prior jurisdiction of equity.** Another exception to the rule denying relief by injunction where defense might be made at law has been based upon the fact of jurisdiction in equity having first attached. Thus, it has been held that when a bill presents a proper case for enjoining a fraudulent judgment, it is immaterial whether the law would afford relief after the judgment has been enforced by execution, since the jurisdiction of equity having first attached in the bill to enjoin upon the ground of fraud, it can not be ousted by a subsequent proceeding in a court of law.<sup>49</sup>

§ 187. **Assignee of note.** As a further exception to the general rule denying relief against a judgment where the defense should have been interposed at law, an injunction has been granted against a judgment in favor of the assignee of a note on the ground of fraud and misrepresentation in the value of the article which was the consideration for the note, the assignee having taken the note with notice.<sup>50</sup> But a court of equity will not enjoin a judgment in favor of an assignee of a note for valuable consideration, who is ignorant of complainant's equities when he takes the note, even though such equities might warrant an injunction against the payee.<sup>51</sup>

§ 188. **Court itself will not take notice of failure to defend at law.** When the judgment debtor has failed to defend at law and afterward attempts to enjoin the judgment upon grounds constituting a defense either at law or in equity, the court will not of its own motion take notice of the failure to

<sup>48</sup> *Horner v. Marshall's Adm'x*,  
5 Munf., 466.

<sup>49</sup> *Gainty v. Russell* 40 Conn.,  
450.

<sup>50</sup> *King v. Baker*, 1 Yerg., 450.

<sup>51</sup> *Donelson v. Young*, Meigs, 155.

defend at law. And if the defendant in the injunction suit does not avail himself of such failure, but answers over on the merits, equity may entertain jurisdiction and enjoin the judgment.<sup>52</sup> If, however, the defense is purely legal, and in its nature unfit for equity jurisdiction, the defendant in the injunction suit may insist upon the want of jurisdiction at the hearing, even though he may not have demurred, but pleaded to the merits instead.<sup>53</sup>

§ 189. **Sickness of defendant; coverture.** Sickness of the defendant at law at the time process is served upon him is held sufficient to warrant an injunction against the judgment, where the sickness is such as to unfit the defendant for the transaction of business, even though no defense was interposed to the action.<sup>54</sup> So if defendant in the suit at law was not *sui juris*, as in the case of a *feme covert*, the judgment may be restrained.<sup>55</sup> And a judgment by default against a *feme covert* being a nullity, its enforcement against her separate estate will be enjoined.<sup>56</sup> So the execution of a judgment rendered against a *feme covert* by confession upon a judgment note which, by reason of her disability, she had no power to execute, will be restrained.<sup>57</sup> And the same strictness of proof is not required to establish an excuse for not making the defense at law as would be requisite to establish the defense itself upon trial.<sup>58</sup>

<sup>52</sup> Galbraith v. Martin, 5 Humph., 50.

<sup>55</sup> Griffith v. Clarke, 18 Md., 457.

<sup>56</sup> Id.

<sup>53</sup> Rice v. Rail Road Bank, 7 Humph., 39.

<sup>57</sup> Hoffman v. Shupp, 80 Md., 611, 31 Atl., 505.

<sup>54</sup> Rice v. Rail Road Bank, 7 Humph., 39. See also Horn v. Queen, 4 Neb., 108.

<sup>58</sup> Rice v. Rail Road Bank, 7 Humph., 39.



## III. JUDGMENTS OBTAINED THROUGH FRAUD.

- § 190. Fraudulent judgment may be enjoined.
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  - 207. Effect of final injunction.
  - 208. Enforcement of vacated judgment enjoined.
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§ 190. **Fraudulent judgment may be enjoined.** The most frequent exceptions to the rule that an injunction will not be allowed against proceedings under a judgment where the defense should have been made at law, are cases where the judgment was obtained through such fraudulent conduct or such deceitful representations as prevented the defendant from asserting his rights in the legal tribunal. Indeed, the exceptions thus recognized are sufficient to constitute a rule of themselves, and it may be said, generally, that where through fraud upon the part of plaintiff or his representatives, defendant is prevented from making his defense at law, equity will relieve against the judgment.<sup>1</sup> The rule, however, as

<sup>1</sup> Carrington v. Holabird, 17 Conn., 544; Wierich v. De Zoya, Conn., 530; Pearce v. Olney, 20 2 Gilm., 385; Burpee v. Smith,

thus stated, is to be taken with the qualification that the relief will not be granted because of fraud alone, but only where the person aggrieved shows a good reason why the defense was not made at law,<sup>2</sup> and when he shows a meritorious defense to the action which he seeks to enjoin.<sup>3</sup> This being shown, and it appearing that defendant was prevented from the assertion of his rights by fraud, unmingled with negligence of his own, a court of equity will afford relief, either by opening the case and allowing another trial, or by awarding a perpetual injunction.<sup>4</sup> And since a judgment is a mere *chose in action*, and a purchaser or assignee takes it subject to all equities existing between the original parties, its enforcement may be enjoined, if obtained through fraud, although it has been assigned to a third person ignorant of such fraud.<sup>5</sup>

§ 190 a. **Definition of fraud.** It is important to bear in mind that the fraud for which equity will relieve against the enforcement of judgments is that practiced in the procurement of the judgment and not that which taints or vitiates the cause of action upon which the judgment was founded. In the latter case, the fraud constitutes a valid defense to the action in which the judgment was rendered and relief will accordingly be denied since there is a complete and adequate remedy at law.<sup>6</sup>

Walk. (Mich.), 327; Kent *v.* Richards, 3 Md. Ch., 392; Green *v.* Haskell, 5 R. I., 447; Hentig *v.* Sweet, 27 Kan., 172; Kelly *v.* Wiard, 49 Conn., 443; Taylor *v.* Nashville & C. R. Co., 86 Tenn., 228, 6 S. W., 393; Kelley *v.* Kriess, 68 Cal., 210, 9 Pac., 129. And in Pearce *v.* Olney, 20 Conn., 544, the court say: "Indeed this falls directly within and is but an illustration of the general rule that equity will interfere to restrain the use of an advantage gained in a court of ordinary jurisdiction. which must necessarily make that court an instrument of injustice in all cases where such advantage has been gained by fraud, accident or mistake of the opposite party."

<sup>2</sup> Lacey *v.* Administrators, 1 Ohio, 256.

<sup>3</sup> Overton *v.* Blum, 50 Tex., 417. And see, *ante*, § 126.

<sup>4</sup> Wierich *v.* De Zoya, 2 Gilm., 385.

<sup>5</sup> Taylor *v.* Nashville & C. R. Co., 86 Tenn., 228, 6 S. W., 393.

<sup>6</sup> Payne *v.* O'Shea, 84 Mo., 129; Murphy *v.* De France, 101 Mo., 151, 13 S. W., 756.

§ 191. **The rule illustrated.** Even though a judgment has been entered by consent of the parties and as the result of a compromise between them, it may still be enjoined upon grounds of fraud, accident, or mistake.<sup>7</sup> And where defendant had a good and meritorious defense upon the merits, but was prevented from asserting it by receiving assurances in writing from plaintiff's attorney that nothing further would be done in the suit until he was notified, the injunction was allowed.<sup>8</sup> So where defendant, through fraud and improper management of the adverse party and with no fault of his own, was prevented from pleading a discharge in bankruptcy against the action at law, the relief was granted.<sup>9</sup> And where, relying upon the written statements of a justice, before whom the suits were brought, that they would be dismissed, no defense was interposed, and the justice afterward rendered judgments without notice to defendants, an injunction was allowed, it being shown that no cause of action existed in favor of plaintiff in the judgments.<sup>10</sup> Nor is the power of a court of chancery to grant the relief taken away by a statute conferring upon the court of law in which the judgment was obtained authority to grant a new trial in such a case.<sup>11</sup> And when a claim against an estate is allowed upon false representations to the court and without notice to the administrator, who does not learn of its allowance until after the time for an appeal has expired, he is entitled to relief by injunction.<sup>12</sup> So

<sup>7</sup> Hahn v. Hart, 12 B. Mon., 426.

<sup>8</sup> Pearce v. Olney, 20 Conn., 544.

<sup>9</sup> Carrington v. Holabird, 17 Conn., 530; Starr v. Heckart, 32 Md., 267. But see, *contra*, Katz v. Moore, 13 Md., 566, where it is held that a judgment at law will not be enjoined because of the discharge of the judgment debtor under the insolvent laws of a state previous to the rendering of such judgment, even though the cause of action accrued before the dis-

charge was granted, the court holding that while the legal liability of the insolvent to pay his debts had ceased, the moral obligation remained as strong as before and was sufficient to sustain the judgment.

<sup>10</sup> Wagner v. Shank, 59 Md., 313.

<sup>11</sup> Carrington v. Holabird, 17 Conn., 530.

<sup>12</sup> Dundas v. Chrisman, 25 Neb., 495, 41 N. W., 449.

where the plaintiff has procured a judgment by means of the introduction in evidence of a forged document, of which complainant had no knowledge at the time of the trial, relief against the judgment will be granted.<sup>13</sup>

§ 192. **Fraudulent alteration of judgment record.** The fact that after judgment and execution the records of the court were fraudulently altered and the amount of the judgment increased, without the knowledge or consent of the judgment debtor, is sufficient to warrant a court of equity in restraining the enforcement of the judgment. And in such case, although the execution might be staid by motion in the court rendering the judgment, yet since the relief sought goes to the judgment itself, equity may properly entertain jurisdiction.<sup>14</sup> So a judgment has been enjoined because of fraud in obtaining a bill of sale upon which the action was founded.<sup>15</sup>

§ 193. **Cases where fraud could not be urged at law.** It not infrequently happens from the peculiar nature and circumstances of the case that the fraud on which a judgment is predicated can not be set up or urged in a legal tribunal. In such cases a court of chancery will afford relief by enjoining proceedings under the judgment.<sup>16</sup> Thus, where a bond on which judgment was obtained was procured by fraudulent and oppressive conduct, and it is by no means clear that a court of law could give the relief asked for, the judgment may be enjoined in equity.<sup>17</sup> So an injunction has been granted against a judgment on a note given for the purchase price of a horse, on the ground of deceitful and fraudulent representations as to his soundness, it appearing that he was unsound.<sup>18</sup> And a judgment for the purchase money of personal property may be enjoined on the ground that, contrary to the repre-

<sup>13</sup> *Marshall v. Holmes*, 141 U. S., 589, 12 Sup. Ct. Rep., 62.

<sup>14</sup> *Babcock v. McCamant*, 53 Ill., 214; *Hardy v. Broadus*, 35 Tex., 668.

<sup>15</sup> *Crawford v. Crawford*, 4 De-saus Eq., 176.

<sup>16</sup> *Collier v. Easton*, 2 Mo., 117 (2d ed.); *West v. Wayne*, 3 Mo., 13 (2d ed.).

<sup>17</sup> *West v. Wayne*, 3 Mo., 13 (2d ed.).

<sup>18</sup> *Waters v. Mattingly*, 1 Bibb, 244. From the case as reported it

sentations of the vendor, the property was incumbered with liens to an amount beyond its value.<sup>19</sup>

§ 194. **Person aggrieved must show due diligence.** He who seeks the aid of equity to prevent the enforcement of a judgment upon the ground of fraud must show due diligence in the assertion of his rights. And where defendant has allowed a suit to proceed to judgment without any attempt on his part to obtain proof, an injunction will not be allowed on the ground of fraud in the original transactions on which the suit was founded.<sup>20</sup> So where the fraud relied upon might have been used as a defense to the action at law, but it does not appear whether it was so used, or whether defendant neglected to avail himself of it, the judgment will not be restrained.<sup>21</sup>

§ 195. **Fraud construed; magistrate not necessary party.** Where the equitable jurisdiction of the court is conferred entirely by statute and is limited to cases of fraud, accident, mistake or account, fraud is construed to mean actual fraud in its strictest sense; and this not appearing in the bill the injunction will be refused.<sup>22</sup> And it is to be observed that the jurisdiction of equity in restraining proceedings under a judgment is not exercised by assuming control over the court in which the proceedings were had, but by controlling the parties to the action. Hence a magistrate before whom a judgment was rendered should not be made a party to the injunction suit.<sup>23</sup>

does not appear that any defense was attempted in the suit on the note, but that it was first interposed in the bill for the injunction.

<sup>19</sup> *Poe v. Decker*, 5 Ind., 150. But it does not appear from the report whether the defendant was apprised of the facts in time to defend at law.

<sup>20</sup> *March v. Edgerton*, 1 Chand., 198.

<sup>21</sup> *Parker v. Morton*, 5 Blackf., 1; *Norwegian Plow Co. v. Bollman*, 47 Neb., 186, 66 N. W., 292, 31 L. R. A., 747.

<sup>22</sup> *Gilder v. Merwin*, 6 Whart., 522; *Riley v. Ellmaker*, 6 Whart., 545.

<sup>23</sup> *Burpee v. Smith*, Walk. (Mich.), 327.



§ 196. **Judgment in violation of agreement enjoined.** In further illustration of the principles already discussed it is held that a judgment obtained in violation of an express agreement and an entry on the docket of the court may be enjoined, even though the judgment creditor does not threaten its enforcement; since his refusal to release the judgment is equivalent to a threat of its enforcement and the injunction is necessary for the protection of the judgment debtor.<sup>24</sup> So where an action before a justice of the peace has been continued by stipulation to be taken up by the consent of the parties, a judgment rendered by default contrary to this agreement will be enjoined, complainant showing a good defense to the action and being guilty of no fault or negligence of his own.<sup>25</sup> And where a judgment has been rendered by default under a general order of the court contrary to an agreement between the parties that the defendant might enter his appearance at any time and that no action would be taken against him because of his delay in this regard, the enforcement of the judgment will be restrained.<sup>26</sup> And the relief is not limited to cases where the judgment has thus been procured contrary to the agreement of the parties but it is extended to cases where it is being enforced contrary to the plaintiff's undertaking. Thus, where, in direct violation of a stipulation between the parties, the judgment creditor has failed to credit his debtor with a payment upon the judgment, and is proceeding to collect the whole, an injunction will be granted.<sup>27</sup> So where it has been agreed that the judgment should be released in full upon payment of one-half of its face, its enforcement in violation of this stipulation will be restrained.<sup>28</sup> But the execution of a judgment entered in violation of the agree-

<sup>24</sup> *Chambers v. Robbins*, 28 Conn., 443, 65 N. E., 843, 94 Am. St. Rep., 552. 662.

<sup>25</sup> *Gulf, C. & S. F. R. Co. v. King*, 80 Tex., 681, 16 S. W., 641. <sup>27</sup> *Newman v. Meek*, Sm. & M. Ch., 331.

<sup>26</sup> *Brooks v. Twitchell*, 182 Mass., 282, 82 N. W., 137. <sup>28</sup> *Johnson v. Huber*, 106 Wis., 282, 82 N. W., 137.

ment of the parties will not be enjoined where the defendant had an adequate remedy by motion to set it aside, of which he has failed to avail himself.<sup>29</sup>

§ 197. **Forged assignment of bond.** So equity may relieve against a judgment recovered against the obligor in a bond by one claiming under a forged assignment, even though the obligor had notice of the fact; since the action being brought in the name of the obligee to the use of the pretended assignee, the obligor is precluded from any inquiry into the genuineness of the assignment in the trial at law, and payment under such circumstances would not protect him against the claim of the rightful owner of the bond.<sup>30</sup>

§ 198. **Statutory judgment; collusion; prior judgment discharged.** Equity, being competent to relieve against an ordinary judgment in a court of law, may also relieve against an execution issued under a statutory judgment springing into being upon the forfeiture of a forthcoming bond, where fraud has been used in obtaining the forfeiture of the bond.<sup>31</sup> So an injunction will be allowed against a sale upon execution under a judgment obtained by collusion, where the property levied upon was purchased with complainant's funds, the judgment having been obtained and the levy procured for the purpose of defeating complainant's claim to the property.<sup>32</sup> And where a judgment has been obtained by default upon a prior judgment, of which the judgment creditor has given a discharge which would have been effectual if pleaded at law, its execution may be restrained.<sup>33</sup>

§ 199. **Fraudulent representations by plaintiff ground for enjoining judgment.** Fraudulent conduct and deceitful repre-

<sup>29</sup> *Kitzman v. Minn. T. Mfg. Co.*, 10 N. Dak., 26, 84 N. W., 585. and it does not appear whether defendant had any opportunity of

<sup>30</sup> *Griffith v. Reynolds*, 4 Grat., 46. pleading the discharge at law, except in the statement of the court

<sup>31</sup> *Nunn v. Matlock*, 17 Ark., 512. that the judgment was obtained

<sup>32</sup> *Greene v. Haskell*, 5 R. I., 447. without right and without the

<sup>33</sup> *Devoll v. Scales*, 49 Maine, 320. knowledge of defendant.

The case is imperfectly reported,

sentations upon the part of plaintiff in an action at law, by means of which defendant, having a meritorious defense, is prevented from interposing it, afford frequent ground for application for the aid of an injunction to restrain the enforcement of judgments thus fraudulently obtained. The general rule upon this subject is well defined and clearly established, both upon principle and authority. And whenever, by reason of plaintiff's fraudulent conduct or representations to defendant concerning the nature and objects of the action, or the purpose of the judgment, or the prosecution of the cause, defendant in the action, having a good defense upon the merits, is lulled into security so that he fails to interpose his defense, he is entitled to the aid of equity to prevent the plaintiff from reaping the benefits of a judgment thus fraudulently obtained.<sup>34</sup> Thus, where judgment has been taken against a defendant by default, after an agreement between the parties to submit the controversy to arbitration, the judgment may be enjoined upon a bill showing a good and valid defense to the action. The relief is allowed in such case upon the ground that when by mistake or fraud one has gained an unfair advantage in proceedings at law, which will operate to make the court of law an instrument of injustice, equity will interfere to prevent him from reaping the benefit of the advantage thus improperly gained.<sup>35</sup> So where defendant has a good defense to a part of the cause of action, but is misled by an agreement with plaintiffs not to make such defense, it is proper to enjoin the collection of the judgment until it can be determined

<sup>34</sup> *Webster v. Skipwith*, 26 Miss., 341; *Pointexter v. Waddy*, 6 Munf., 418; *Baker v. Redd*, 44 Iowa, 179; *Bigham v. Gorham*, 52 Ga., 329; *Bresnehan v. Price*, 57 Mo., 422; *Hinckley v. Miles*, 15 Hun, 170; *Markham v. Needham*, 57 Ga., 43; *Delaney v. Brown*, 72 Vt., 344, 47 Atl., 1067. See also *Hemphill v. Ruckersville Bank*, 3 Ga., 435; *Pearce v. Olney*, 20 Conn., 544; *Kelley v. Kriess*, 68 Cal., 210, 9 Pac., 129.

<sup>35</sup> *Bresnehan v. Price*, 57 Mo., 422.

upon final hearing whether he is entitled to be heard upon his defense.<sup>36</sup>

§ 200. **The rule illustrated.** Illustrations of the rule as above stated are numerous, but the same general principle of preventing one who has gained a legal advantage by fraud from availing himself of its benefits will be found to underlie them all. Thus, where plaintiff in the action induces defendants to withdraw their defense and to permit judgment to go against them, upon his assurance and undertaking that he will stay proceedings after judgment until a given time, and will then carry out a settlement agreed upon between the parties upon the basis of the plea or defense which is withdrawn, and plaintiff afterwards attempts to enforce the judgment in violation of his agreement, a proper case is presented for relief by injunction.<sup>37</sup> So where the maker of a promissory note has paid it in full, and holds a receipt to that effect from the indorsee, but consents to judgment against him in favor of the latter, upon his representations that he will not enforce the judgment against the maker, and that he only desires to enforce it against the indorser, the maker of the note may enjoin the collection of the judgment upon the ground of fraud.<sup>38</sup> And when defendant in a suit upon a promissory note might have successfully pleaded *non est factum* to the action, but was prevented from so doing by the representations of plaintiff, an injunction may be allowed to restrain the enforcement of the judgment.<sup>39</sup> So when the bill alleges that the note upon which judgment was rendered had been settled by agreement with plaintiff in the action, and that the suit was to be considered at an end, but that plaintiff went on without the knowledge

<sup>36</sup> *Dunnahoo v. Holland*, 51 Ga., 147.

<sup>38</sup> *Baker v. Redd*, 44 Iowa, 179.

<sup>39</sup> *Poindexter v. Waddy*, 6 Munf.,

<sup>37</sup> *Markham v. Needham*, 57 Ga., 418.

43. See also *Hemphill v. Ruckersville Bank*, 3 Ga., 435.

or consent of defendant in the action and took judgment against him, and these allegations are not specifically or fully denied upon the motion for the injunction, it is not error to grant an injunction until the final hearing.<sup>40</sup> And a judgment which is obtained by fraudulent representations upon the part of plaintiff to defendant, both as to the purpose of the action and the amount sought to be recovered, may properly be enjoined.<sup>41</sup> And it is to be observed that the application of the rule is the same whether the fraudulent conduct or deceitful representation of the plaintiff were used by him to obtain the judgment in the first instance or for the purpose of retaining the benefits of the judgment after its rendition by fraudulently depriving the defendant of his day in court in which to have the judgment vacated or to obtain a new trial.<sup>42</sup>

§ 201. **Cases where relief refused; special agreements; surety.** Where, however, by agreement between the parties to a cause it is stipulated that the judgment shall be paid in a given way and within a given time, and before the expiration of the time specified plaintiff issues execution upon the judgment, the judgment debtor can not enjoin proceedings under the execution until he has first offered to pay the judgment in accordance with the terms of the agreement.<sup>43</sup> And an agreement made between the judgment creditor and his debtor, without consideration, that if the debtor will pay one-half the debt when due, the creditor will make the other half out of the property of a co-debtor, and will not look to the judgment debtor, is not such an estoppel against the creditor as to warrant an injunction to prevent him from enforcing a judgment for the full amount.<sup>44</sup> Nor will an injunction lie to restrain a judgment against complainant

<sup>40</sup> *Bigham v. Gorham*, 52 Ga., 329.

<sup>41</sup> *Hinckley v. Miles*, 15 Hun, 170.

<sup>42</sup> *Delaney v. Brown*, 72 Vt., 344.

<sup>47</sup> Atl., 1067; *Thompson v. Laughlin*, 91 Cal., 313, 27 Pac., 752.

<sup>43</sup> *Town of Anamosa v. Wurzbacher*, 37 Iowa, 25.

<sup>44</sup> *Smith v. Tyler*, 51 Ind., 512.



upon a note executed by him as surety, the only equity in support of the bill being that fraudulent representations were made by the principal to obtain the signature of the surety, no fraud or misrepresentation being charged upon the payee.<sup>45</sup>

§ 202. **Fraudulent representations by plaintiff's attorney ground for enjoining judgment; must allege attorney's authority.** It is also to be noticed that the cases in which the relief is granted upon the ground of fraud are not limited to those where the fraudulent representations are those of plaintiff in person, but that the fraudulent conduct of plaintiff's attorney in the cause may afford sufficient ground for enjoining a judgment which is obtained by means of such fraud.<sup>46</sup> And where plaintiff's attorney has taken judgment in violation of his express agreement with defendant, the agreement being within the scope of the attorney's authority, the enforcement of the judgment may be restrained because of such fraud on the part of the attorney.<sup>47</sup> So when defendant in the judgment shows a good equitable defense thereto, which he was prevented from making by relying upon the representations of the solicitor for plaintiff in the action, proceedings under the judgment may properly be enjoined.<sup>48</sup> So where defendant, on being served with process, applied to his regular attorney to defend the cause, and stated to him his grounds of defense, and was informed by him that he appeared as attorney for plaintiff, but that he was satisfied with the justice of his defense, and would take no judgment against him, and defendant, relying upon such assurances, made no defense to the action and was not aware of the judgment until after it was ren-

<sup>45</sup> *Griffith v. Reynolds*, 4 Grat., *Thompson v. Laughlin*, 91 Cal., 313, 46. 27 Pac., 752.

<sup>46</sup> *Kent v. Ricards*, 3 Md. Ch., <sup>47</sup> *Kent v. Ricards*, 3 Md. Ch., 392; *Holland v. Trotter*, 22 Grat., 392; *Hentig v. Sweet*, 27 Kan., 172. 136; *O'Neill v. Browne*, 9 Ir. Eq., <sup>48</sup> *O'Neill v. Browne*, 9 Ir. Eq., 131; *Hentig v. Sweet*, 27 Kan., 172; 131.

dered, the judgment was enjoined.<sup>49</sup> But to warrant relief in all such cases, where a judgment has been taken contrary to an agreement made by the plaintiff's attorney, it is incumbent upon the complainant to make affirmative allegations that the attorney had authority to bind the plaintiff by such agreement; and in the absence of positive allegations to this effect, the bill is fatally defective and the relief will be denied.<sup>50</sup>

§ 203. **Fraud may consist in mere silence, or suppressio veri.** It is important, also, to be borne in mind in considering the nature and grounds of equitable relief against fraudulent judgments, that the fraud which is made the foundation for the relief is not necessarily of an active or affirmative nature, but may consist in mere silence or suppression where good faith and fair dealing would require a disclosure of facts which are concealed. For example, when, in proceedings to determine the title to real estate, a mistake in the description of the premises results in depriving defendant of property without an opportunity of maintaining his title, and he does not discover the mistake until too late to review the proceedings at law, but plaintiff being aware of the mistake remains silent until the time for reviewing the proceedings has expired, and then brings an action of tort against defendant for trespassing upon the lands thus recovered, sufficient fraud is shown to warrant an injunction to restrain plaintiff in the former action from setting up the judgment therein as an estoppel.<sup>51</sup>

§ 204. **Satisfactory proof of fraud required.** In the class of cases under consideration satisfactory proof is required of the fraud upon which the judgment is sought to be enjoined. And an injunction, if already granted, will not be sustained because of fraud on the part of the judgment creditor when the allegations of fraud are fully negatived by answer and are

<sup>49</sup> *Holland v. Trotter*, 22 Gratt., 136.

<sup>50</sup> *Anderson v. Oldham*, 82 Tex., 228, 18 S. W., 557.

<sup>51</sup> *Currier v. Esty*, 110 Mass., 536.

not established by proof, and when it does not appear that defendant in the action at law was defeated by accident or surprise.<sup>52</sup>

§ 205. **Plaintiff must come into court with clean hands.** It is also to be borne in mind that he who would have equitable relief against a judgment upon the ground of fraud, must himself come into the court with clean hands, since courts of equity will not interpose their extraordinary relief by injunction in favor of one who has himself participated in the fraudulent action which is made the basis of relief.<sup>53</sup> Where, therefore, a debtor in failing circumstances executes a bond with a warrant of attorney to confess judgment, for the purpose of hindering and defrauding his creditors, he will not afterward be allowed an injunction to restrain proceedings under the judgment.<sup>54</sup> So where one without consideration confesses judgment for the purpose of withdrawing his property from the demands of creditors of an incorporated company in which he is a shareholder, he will not be allowed to enjoin the enforcement of the judgment thus fraudulently confessed.<sup>55</sup>

§ 206. **False representations by vendor of patented medicines.** Where the right to manufacture a particular medicine, composed of certain ingredients in certain specified proportions, and to procure letters patent thereon, was conveyed to a purchaser, an interlocutory injunction was granted until the hearing to restrain the enforcement of judgments for the purchase money, upon a bill alleging false representations by the vendor as to the active agent or ingredient of the medicine, such representations being the inducement to make the purchase.<sup>56</sup>

<sup>52</sup> Briesch *v.* McCauley, 7 Gill, 189.

<sup>53</sup> Bateman *v.* Ramsay, Sau. & Sc., 459; McCurdy *v.* Martin, 5 Ir. Eq., 515. And see Taylor *v.* Campbell, 10 Ir. Eq., 249.

<sup>54</sup> Bateman *v.* Ramsay, Sau. & Sc., 459.

<sup>55</sup> McCurdy *v.* Martin, 5 Ir. Eq., 515. And see Taylor *v.* Campbell, 10 Ir. Eq., 249.

<sup>56</sup> Flippin *v.* Knaffle, 2 Tenn. Ch., 238.

§ 207. **Effect of final injunction.** When an injunction is made perpetual against the enforcement of an execution under a judgment at law because of fraud in procuring the judgment, the effect of such final injunction is only to prevent the use of the process of the court, without annulling the process itself. In other words, the injunction in such case does not operate upon the process of the court itself, but only enjoins defendant from using that process.<sup>57</sup>

§ 208. **Enforcement of vacated judgment enjoined.** The enforcement of an execution upon a judgment for the recovery of lands, which has been vacated and set aside, may be properly enjoined, especially when the plaintiff in such vacated judgment has long acquiesced therein without complaint.<sup>58</sup>

§ 208 *a*. **Injunction against judgment for alimony.** Where a wife obtains a judgment for alimony in a divorce proceeding against her husband, the enforcement of such judgment will be enjoined in a subsequent suit for absolute divorce instituted by the husband against the wife upon the ground that she was a married woman at the time of her marriage to the plaintiff. In such case the court entertains jurisdiction upon the ground that it would be against conscience to permit the enforcement of the judgment.<sup>59</sup>

<sup>57</sup> *Gainty v. Russell*, 40 Conn., 450. has been satisfied under a compromise between the parties, see *Wray*

<sup>58</sup> *Marsh v. Prosser*, 64 Ind., 293. *v. Chandler*, 64 Ind., 146.

As to the facts which constitute sufficient ground for enjoining the enforcement of a judgment which <sup>59</sup> *Scurlock v. Scurlock*, 92 Tenn., 629, 22 S. W., 858.

## IV. ACCIDENT, MISTAKE, IGNORANCE AND SURPRISE.

- § 209. Foundation of the jurisdiction; loss of instruments; sickness; ignorance of service of process.
210. Distinction between accident and carelessness; illustrations.
211. Distinction between mistakes of fact and of law.
212. Mistake of fact ground for enjoining judgment.
213. Mistake of clerk; second injunction allowed for mistake; miscalculation of jury.
214. When judgment too large injunction allowed only as to excess.
215. Mistake of court ground for injunction; facts should be stated in bill.
216. Mistakes of counsel no ground for injunction.
217. Laches and negligence a bar to relief.
218. Remedy at law bars relief.
219. Distinction between ignorance of law and of fact.
220. Ignorance of fact, when ground for injunction.
221. Ignorance or misconduct of attorney no ground for enjoining judgment; insolvency of attorney immaterial.
222. False return of service by sheriff; diligence required.
223. Assignee of note; notice of equities.
224. Surprise as a ground for relief; gaming.

209. **Foundation of the jurisdiction; loss of instruments; sickness; ignorance of service of process.** The jurisdiction of equity in restraint of judgments obtained against persons who, through accident, mistake, ignorance, or surprise, have been prevented from establishing their defense at law, results from its well established jurisdiction over these general subjects, and is governed by the same general principles. The relief is extended, primarily, for the prevention of irreparable mischief which courts of law are powerless to redress. Thus, the loss at the time of trial of a written agreement between the maker and payee of a note, relating to the contract in pursuance of which the note was made, and without which the maker could not establish his defense at law, will authorize an injunction against the judgment.<sup>1</sup> And the loss

<sup>1</sup> *Vathir v. Zane*, 6 Grat., 246.



of a written instrument which would have operated as a defeasance of a bond has been deemed sufficient to warrant an injunction against the judgment, even where the defense was not relied upon at law.<sup>2</sup> So equity will restrain a judgment on the ground that the debt on which the action was brought had been paid, defendant having been prevented from pleading such payment at law by accident, and without laches on his part.<sup>3</sup> So where judgment was obtained against a defendant upon a promissory note, to which his name had been forged, and he was notified by the sheriff, who served him with process, that he need not appear at the return term, and that the other makers of the note would appear and defend for him, it was held that these facts, coupled with the sickness of such defendant, and the fact that the other defendants did employ counsel who appeared and pleaded for the defendants but afterwards withdrew their plea, were sufficient ground for enjoining the enforcement of the judgment against him.<sup>4</sup> And a judgment recovered upon a note which is barred by the statute of limitations, which was properly pleaded, may be enjoined until the hearing when the defendant in the action was sick and his counsel was absent at the hearing, the judgment having been confessed by one not the attorney of the defendant in the action and without authority in the premises.<sup>5</sup> And where a case, when reached for trial, was continued upon plaintiff's motion and, through accident or mistake, an order was entered continuing it at defendant's cost, the enforcement of such judgment for costs is properly enjoined.<sup>6</sup> And where a foreign corporation was required, as a condition to doing business in a state, to designate a state officer as an attorney to receive service of process, the failure of such officer to notify the corporation, as required

<sup>2</sup> *Wilson v. Davis*, 1 Marshall, 219.

<sup>3</sup> *Humphreys v. Leggett*, 9 How., 297.

<sup>4</sup> *Rowland v. Jones*, 2 Heisk., 321.

<sup>5</sup> *Cheek v. Taylor*, 22 Ga., 127.

<sup>6</sup> *Williams v. Pile*, 104 Tenn., 273, 56 S. W., 833.

by law, of the service of summons in a pending action, is sufficient ground for enjoining a judgment subsequently rendered by default. In such case the negligence of the state official in failing to notify the corporation is not attributable to the latter, since it has no choice in the matter as to his selection.<sup>7</sup> But where, in an action against a county, service is had upon the county clerk, his failure to notify the proper county officials of the fact of service is no ground for an injunction, since the negligence of the clerk, he being the agent of the county, is that of the county.<sup>8</sup>

§ 210. **Distinction between accident and carelessness; illustrations.** It is important, however, to distinguish carefully between that degree of unavoidable accident which will warrant relief in equity against a judgment, in the exercise of the ancient and well defined jurisdiction of equity upon the ground of accident, and mere laches or carelessness upon the part of a defendant in failing to take proper measures for his defense in the action at law. And whenever the judgment complained of, and which it is sought to enjoin, has resulted from defendant's own carelessness, laches or omission to properly prepare or present his defense, he can not obtain relief by injunction, such cases being clearly distinguishable from those of unavoidable accident already considered.<sup>9</sup> Thus, the absence of a witness in behalf of defendant in an action at law affords no ground for relief by injunction against the judgment, when no reasonable diligence was used in endeavoring to obtain the attendance of such witness, and when no effort was made to procure a continuance because of his absence.<sup>10</sup> Nor will the absence of defendant upon the trial of the action warrant an

<sup>7</sup> *National Surety Co. v. State Bank*, 56 C. C. A., 657, 120 Fed., 593, 61 L. R. A., 394.

<sup>8</sup> *Knox County v. Harshman*, 133 U. S., 152, 10 Sup. Ct. Rep., 257.

<sup>9</sup> See *Matthis v. Town of Cameron*, 62 Mo., 504; *Gott v. Carr*, 6 G. & J., 309; *Shaffer v. Sutton*, 49 Ill., 506; *Crim v. Handley*, 4 Otto, 652.

<sup>10</sup> *Gott v. Carr*, 6 G. & J., 309.

injunction against the judgment, since it is the duty of a defendant to be present at the trial, in person or by attorney, to avail himself of his defense to the action.<sup>11</sup> And the mere neglect of a public officer, such as the chairman of a board of trustees of a town, to defend an action against the town which he represents, will not justify a court of equity in restraining the payment of the judgment in the absence of any showing of fraud or collusion.<sup>12</sup> So a judgment will not be enjoined because of the absence of one of defendant's counsel upon the trial, nor because one of the witnesses for defendant was so sick during his examination as to impair his recollection, and render him incapable of stating material facts within his knowledge, defendant having failed to ask a postponement or continuance of the trial upon this ground.<sup>13</sup> And the fact that defendant in an action at law was, by reason of sickness, unable to attend the court to which he was summoned, does not relieve him of the duty of diligence in asserting his defense at law, and affords no ground for enjoining a judgment recovered against him upon a just and meritorious cause of action.<sup>14</sup> So where defendant in a judgment seeks to enjoin its enforcement against him upon the ground of an offer of compromise and settlement made before the judgment and pending the suit at law, which offer was accepted by plaintiff, but defendant failed to pay the money required, the fact that he paid no further attention to the suit after the offer of compromise will not warrant the court in enjoining the judgment.<sup>15</sup>

§ 211. **Distinction between mistakes of fact and of law.** With regard to the relief against judgments obtained through mistake, a distinction is drawn between cases where the mistake is one of fact and where it is of law. And while in the former case the relief is freely exercised upon sufficient cause

<sup>11</sup> *Gott v. Carr*, 6 G. & J., 309.

<sup>12</sup> *Matthis v. Town of Cameron*,  
62 Mo., 504.

<sup>13</sup> *Crim v. Handley*, 4 Otto, 652.

<sup>14</sup> *Shaffer v. Sutton*, 49 Ill., 506.

<sup>15</sup> *Lowry v. Sloan*, 51 Ga., 633.

shown, equity will not interfere where the mistake is one of law.<sup>16</sup> Thus, a naked mistake in law will not warrant an injunction against a judgment upon a note which was executed voluntarily and with full knowledge of all the facts.<sup>17</sup> Nor will the relief be awarded where the mistake is mutual to both parties to the action, as where defendant confessed judgment for the purpose of afterward removing the cause to a higher court on appeal, and it being afterward found that the right of appeal did not exist.<sup>18</sup> Even though the damages are obviously excessive, yet there being no fraud, but simply a mistake of law in which both parties have joined, the injunction will be refused.<sup>19</sup> Nor will the fact that the mistake was caused by the suggestion and advice of the court constitute sufficient ground for an injunction.<sup>20</sup>

§ 212. **Mistake of fact ground for enjoining judgment.**

Though a mistake of law does not constitute sufficient ground to restrain a judgment, as we have seen in the preceding section, yet a mistake of fact will frequently warrant a court of equity in the exercise of this jurisdiction. Thus, a judgment obtained through mistake, for an amount greater than that actually due, constitutes such a case as will warrant the interposition of equity.<sup>21</sup> If, however, the judgment has been rendered on an account stated between the parties, the amount due being agreed upon, it will not be enjoined because of an alleged mistake in the account, which was not discovered until after the verdict was rendered, and after the time for a new trial had elapsed.<sup>22</sup> Where the appearance of a defendant was entered by mistake, and without service of process upon him,

<sup>16</sup> *Hubbard v. Martin*, 8 Yerg., 498; *Richmond & S. R. Co. v. Shippen*, 2 P. & H. (Va.), 327; *Risher v. Roush*, 2 Mo. (2d ed.), 77; *Meem v. Rucker*, 10 Grat., 506; *Shricker v. Field*, 9 Iowa, 366.

<sup>17</sup> *Hubbard v. Martin*, 8 Yerg., 498.

<sup>18</sup> *Richmond & S. R. Co. v. Shippen*, 2 P. & H. (Va.), 327.

<sup>19</sup> *Id.*

<sup>20</sup> *Risher v. Roush*, 2 Mo. (2d ed.), 77.

<sup>21</sup> *Chase v. Manhardt*, 1 Bland, 333.

<sup>22</sup> *Falls v. Krebs*, 5 Md., 365.

a proper case is afforded for relief against the judgment; but, in such case, the injunction should not be made perpetual, and should only continue until defendant can be let in to make his defense at law in the court where the judgment was obtained.<sup>23</sup> But the fact that process was served upon the wrong person, who makes no defense at law, but allows judgment to be taken against him by default, and execution having issued, gives a forthcoming bond, will not warrant an injunction.<sup>24</sup>

§ 213. **Mistake of clerk; second injunction allowed for mistake; miscalculation of jury.** A judgment of an inferior court may be enjoined where complainants show a good defense upon the merits, which they were prevented from making by the dismissal of their appeal, because of a mistake of the clerk in not drawing the appeal bond properly, and without fault on their part.<sup>25</sup> Even after one injunction against a judgment has been dissolved, another may be granted and made perpetual upon new matter of which complainant was ignorant at the time of the dissolution of the first, the new equity consisting of a mistake as to an important fact of which both parties were ignorant at the time the judgment was obtained and the former injunction dissolved.<sup>26</sup> And a mistake or a miscalculation of the jury, such as, if discovered in time, would have furnished good ground for a new trial, will warrant a court of equity in restraining a judgment.<sup>27</sup>

§ 214. **When judgment too large injunction allowed only as to excess.** Where the mistake consists either in awarding judgment or in issuing execution for an amount greater than that which is actually due, the injunction should be allowed only as to the excess over and above that justly due. Thus,

<sup>23</sup> *Campbell v. Edwards*, 1 Mo. (2d ed.), 231.

<sup>26</sup> *Armstrong v. Hickman*, 6 Munf., 287.

<sup>24</sup> *Chisholm v. Anthony*, 2 H. & M., 13.

<sup>27</sup> *Chase v. Manhardt*, 1 Bland, 333.

<sup>25</sup> *Saunders v. Jennings*, 2 J. J. Marsh., 513.



where, through mistake, judgment is obtained for too great an amount, the verdict itself will not be disturbed as to the sum really due, nor will a new trial be ordered; the judgment will merely be enjoined as to the excess and allowed to operate as to the remainder.<sup>28</sup> Or where an error has been committed in issuing a writ of *fi. fa.* for an amount greater than that to which the judgment creditor is entitled, the injunction will be limited to the amount erroneously included, and the whole judgment will not be enjoined.<sup>29</sup>

§ 215. **Mistake of court ground for injunction; facts should be stated in bill.** The cases in which relief by injunction against a judgment at law may be allowed, because of mistakes of fact, are not limited to mistakes on the part of the parties to the litigation, and relief has been allowed because of mistakes of fact upon the part of the court. For example, where a bill of exceptions is dismissed in an appellate court because of a mistake in the date of the certificate, but such mistake is shown to have been that of the judge who signed the bill, and not of the parties or counsel, it is proper to restrain the enforcement of the judgment until a full hearing can be had upon the merits.<sup>30</sup> So where by the mistake of the magistrate before whom a cause is pending, in failing to note the name of counsel for the defense of a suit, judgment is had by default, and the defendant in ignorance of the facts permits the time for an appeal to elapse, execution upon the judgment may be enjoined until a full hearing can be had upon the merits, the bill disclosing a defense to the original action. In cases of this nature, however, where one seeks to enjoin a judgment against him upon the ground that he had a good defense at law which he was prevented from making, it is not sufficient to allege, generally, that he was prevented from making his defense by

<sup>28</sup> *Barrow v. Robichaux*, 14 La. An., 207.

<sup>29</sup> *Kohn v. Lovett*, 43 Ga., 179.

<sup>30</sup> *Brewer v. Jones*, 44 Ga., 71.

mistake, oversight, or omission, but he should allege the facts as they occurred, so that the court may determine whether the result was due to any fault or want of diligence upon his part in failing to defend at law.<sup>31</sup>

§ 216. **Mistakes of counsel no ground for injunction.** Notwithstanding injunctions are somewhat freely granted against the enforcement of judgments upon the ground of mistakes of fact, as is thus shown, yet the mere omissions or mistakes of counsel in the conduct or management of an action at law can not be made the ground for renewing the litigation by enjoining the judgment. Defendant in a judgment can not, therefore, enjoin its enforcement because of matters of defense of which he might have availed himself in the former action, but which were omitted under the advice of his counsel.<sup>32</sup> Nor is it sufficient ground for enjoining a judgment that plaintiff's attorney has failed to enter a credit upon the execution in accordance with an agreement to that effect.<sup>33</sup>

§ 217. **Laches and negligence a bar to relief.** Laches upon the part of the complainant seeking relief by injunction upon the ground of mistake, may debar him from the aid of equity, even in a case which is otherwise meritorious. And when complainant seeks to enjoin a judgment because of a mistake in the date of the bill of exceptions, but he has been guilty of gross laches in not endeavoring to correct the mistake in due season, having been fully apprised of it, he will be refused relief.<sup>34</sup> So a judgment will not be enjoined by reason of a mistake in defending the action, the only effect of which was that defendant in the action failed to obtain a review of his case in a higher court, the real purpose of the injunction suit being only to obtain such review, the defendant having shown a want of ordinary care and diligence in the conduct of his defense.<sup>35</sup>

<sup>31</sup> *Simons v. Martin*, 53 Ga., 620.

<sup>34</sup> *Smith v. Fouche*, 55 Ga., 120.

<sup>32</sup> *Hambrick v. Crawford*, 55 Ga., 335.

<sup>35</sup> *Quinn v. Wetherbee*, 41 Cal., 247.

<sup>33</sup> *Brown v. Wilson*, 56 Ga., 534.

§ 218. **Remedy at law bars relief.** The jurisdiction of equity in restraining the collection of judgments upon the ground of mistake is thus shown to be governed by the same general and controlling principles which prevail in other branches of its extraordinary preventive jurisdiction. And it is important also to note that the general doctrine denying relief by injunction where ample remedy exists at law applies with equal force in this as in all other branches of the law under consideration. Thus, an injunction will not be granted for the correction of a mistake in an allowance and classification by a court of probate of claims against an estate, when ample relief may be had by proceedings in the probate court itself to have the mistake corrected by an entry *nunc pro tunc*.<sup>36</sup> Nor will the enforcement of a judgment be restrained because of a mistake on the part of defendant at law in interposing his defense in proper time, when the court of law has ample power to afford relief, but has refused, after hearing, to set aside the judgment upon defendant's application.<sup>37</sup>

§ 219. **Distinction between ignorance of law and of fact.** The distinction already observed between mistakes of law and of fact in the exercise of the jurisdiction of equity in restraint of judgments applies with equal force to cases where the relief is sought upon the ground of ignorance. And it is held that, while ignorance of material facts necessary to establish a legal defense may warrant the interposition of equity, ignorance of law does not afford sufficient reason for the exercise of the jurisdiction.<sup>38</sup> Thus, where one has failed to make his defense at law through ignorance of the nature of the proceedings against him, and of the necessary steps to be taken, he will not be allowed to enjoin the judgment.<sup>39</sup>

<sup>36</sup> *Jillett v. Union National Bank*, 56 Mo., 304.

<sup>37</sup> *Reagan v. Fitzgerald*, 75 Cal., 230, 17 Pac., 198.

<sup>38</sup> *Meem v. Rucker*, 10 Grat., 506; *Shricker v. Field*, 9 Iowa, 366.

<sup>39</sup> *Meem v. Rucker*, 10 Grat., 506. And it is held that in such case, a mere averment of the facts relied upon to entitle complainant to relief against the judgment, will not suffice, but the matter alleged in

§ 220. **Ignorance of fact, when ground for injunction.** It may be laid down as a general rule that ignorance of important facts material to the establishment of a defense to the action at law will, in the absence of laches on the part of defendant, warrant a court of equity in extending relief by injunction against the judgment.<sup>40</sup> Thus, where defendant, before and at the time of recovering judgment against him, was ignorant of facts which would have constituted a valid defense at law, an injunction may be allowed to restrain the judgment.<sup>41</sup> So where, by collusion upon the part of the president of a corporation, judgment was recovered against the corporation, its shareholders, who were ignorant of the proceedings, and who had no opportunity of resisting the judgment, are entitled to an injunction.<sup>42</sup> So also, where the purchaser of lands is sued for the unpaid purchase money, and remains in ignorance of the fact that the vendor had not a good title to the premises conveyed until after judgment is recovered against him, such ignorance will be regarded as a sufficient excuse for not defending at law, and the purchaser may still be allowed an injunction against the judgment.<sup>43</sup> But in all such cases, complainant must be entirely free from fault or neglect; and where, by the exercise of reasonable diligence, he might have ascertained the facts constituting his defense, the relief will be denied.<sup>44</sup>

excuse for not having defended at law must be proven. *Id.* Upon this point the case certainly lacks the weight of authority, and it is believed that no other decision has gone to this extent.

<sup>40</sup> *Hubbard v. Hobson*, Breese, 147; *Iglehart v. Lee*, 4 Md. Ch., 514; *Cape Sable Company's Case*, 3 Bland, 606. And see *Williams v. Lee*, 3 Atk., 223; *LeGuen v. Gouverneur*, 1 Johns. Cas., 436; *Barker v. Elkins*, 1 Johns. Ch., 465; *Dun-*

*can v. Lyon*, 3 Johns. Ch., 351; *Fitch v. Polke*, 7 Blackf., 564.

<sup>41</sup> *Iglehart v. Lee*, 4 Md. Ch., 514; *Hubbard v. Hobson*, Breese, 147. See also *Holt's Ex'rs v. Graham*, 2 Bibb, 192; *Cunningham v. Caldwell*, Hardin, 131.

<sup>42</sup> *Cape Sable Company's Case*, 3 Bland, 606.

<sup>43</sup> *Fitch v. Polke*, 7 Blackf., 564.

<sup>44</sup> *Harding v. Hawkins*, 141 Ill., 572, 31 N. E., 307, 33 Am. St. Rep., 347; *Spokane Coop. M. Co. v. Pearson*, 28 Wash., 118, 68 Pac., 165.

§ 221. **Ignorance or misconduct of attorney no ground for enjoining judgment; insolvency of attorney immaterial.** The operation of the rule, as regards ignorance of law, is not confined to the case of a party's own ignorance, but in conformity with the maxim *qui facit per alium facit per se*, ignorance or mistake on the part of counsel employed in a cause will not authorize an injunction against the judgment.<sup>45</sup> So in the absence of fraud mere negligence on the part of an attorney retained to defend a suit, is not sufficient ground for the interference of equity to restrain a judgment.<sup>46</sup> So the negligence or improper conduct of an attorney employed to defend a suit at law, or his failure or neglect to defend the action, will not justify an injunction against the judgment.<sup>47</sup> And in such cases, the relief is properly denied, even though it appeared that the defendant had a good defense to the action, and the attorney, through whose fault the judgment resulted, is insolvent.<sup>48</sup> Nor does it constitute ground for relief that the plaintiff in the judgment has knowingly permitted the time to pass in which the defendant might have had the judgment set aside, without informing the defendant of its existence.<sup>49</sup> Nor will the abandonment of a cause by an attorney warrant an injunction against the judgment where other counsel were employed and a trial had, there being no allegations of fraud.<sup>50</sup>

<sup>45</sup> *Shricker v. Field*, 9 Iowa, 366; *Inown*, 97 Ky., 757, 31 S. W., 874, 31 L. R. A., 33, 53 Am. St. Rep., 437; *Kern v. Strausberger*, 71 Ill., 413; *Clark v. Ewing*, 93 Ill., 572; *Bardonski v. Bardonski*, 144 Ill., 284, 33 N. E., 39.

<sup>46</sup> *Wynn v. Wilson*, Hemp., 698. But in a subsequent application to the court for an injunction in the same cause, fraud being shown in the assignment of the notes on which the judgment was founded, the relief was allowed. See note to same case.

<sup>48</sup> *Kern v. Strausberger*, 71 Ill., 413; *Clark v. Ewing*, 93 Ill., 572; *Bardonski v. Bardonski*, 144 Ill., 284, 33 N. E., 39.

<sup>49</sup> *Amherst College v. Allen*, 165 Mass., 178, 42 N. E., 570.

<sup>47</sup> *Chester v. Apperson*, 4 Heisk., 639; *Odell v. Mundy*, 59 Ga., 641; *Amherst College v. Allen*, 165 Mass., 178, 42 N. E., 570; *Payton v. Mc-*

<sup>50</sup> *Winchester v. Grosvenor*, 48 Ill., 517.



§ 222. **False return of service by sheriff; diligence required.**

Where judgment has been rendered against defendant without notice and without appearance or defense on his part, the sheriff having made a false return of service, equity will relieve against the judgment on the ground that the circumstances rendering it void are extrinsic to the judgment, and a court of law is, therefore, powerless to arrest its execution.<sup>51</sup> Nor, in such a case, is it material to inquire whether a defense could have been made at law, the injury complained of being that the judgment was rendered without notice and without opportunity to defend.<sup>52</sup> But it is held that an allegation in the bill that defendant in the action at law did not come into possession of the facts upon which he asks relief against the judgment will not, of itself, suffice, but it must appear that he could not have obtained such data by the use of ordinary diligence.<sup>53</sup> And when it is sought to enjoin a judgment upon the ground that the cause of action had been fully paid before judgment, of which fact defendant was ignorant at the time of the hearing, but the facts disclose gross negligence on his part in not defending upon that ground, the injunction will be refused.<sup>54</sup>

§ 223. **Assignee of note; notice of equities.** Proceedings under a judgment in favor of the assignee of a note for valuable consideration will not be restrained where the assignee was ignorant of complainant's equities when he took the note, even though such equities might warrant the court in restraining the payee of the note from its collection.<sup>55</sup> But the rule is otherwise when the assignee has taken the note with notice.<sup>56</sup>

<sup>51</sup> *Ridgeway v. Bank*, 11 Humph., 523; *Huntington v. Crouter*, 33 Ore., 408, 54 Pac., 208, 72 Am. St. Rep., 726; *Dowell v. Goodwin*, 22 R. I., 287, 47 Atl. 693, 51 L. R. A., 873, 84 Am. St. Rep., 842.

<sup>52</sup> *Ridgeway v. Bank*, 11 Humph., 523.

<sup>53</sup> *Leggett v. Morris*, 6 Sm. & M., 723.

<sup>54</sup> *Tutt v. Ferguson*, 13 Kan., 45.

<sup>55</sup> *Donelson v. Young*, Meigs, 155.

<sup>56</sup> *King v. Baker*, 1 Yerg., 450.

§ 224. **Surprise as a ground for relief; gaming.** Surprise will authorize a court of equity to interfere in certain cases and restrain proceedings under a judgment. Thus, where defendant had no knowledge of the existence of the suit at law against him until after judgment obtained, an injunction has been allowed on the ground of surprise.<sup>57</sup> But an execution under a judgment in attachment will not be enjoined on the ground of surprise where process was actually served upon the defendant.<sup>58</sup> Nor can the validity of the judgment upon which the attachment was issued be assailed collaterally in a suit in equity to restrain proceedings under the judgment.<sup>59</sup> Where the consideration for the promise on which the action was brought was money lost at gaming, if the defendant is surprised at the trial, it is held that he may afterward come into equity for relief.<sup>60</sup> But the mere want of preparation for trial on the part of defendant in the action will not justify an injunction against the judgment, when no application was made for a postponement of the trial upon that ground, and when the case was fully tried upon its merits.<sup>61</sup>

<sup>57</sup> *Mosby v. Haskins*, 4 Hen. & M., 427.

<sup>58</sup> *Peters v. League*, 13 Md., 58.

<sup>59</sup> *Id.*

<sup>60</sup> *White v. Washington*, 5 Grat., 645.

<sup>61</sup> *Dilly v. Barnard*, 8 G. & J., 170.

## V. IRREGULAR, ERRONEOUS AND VOID JUDGMENTS.

- § 225. Irregularities, no ground for injunction.  
 226. Errors of law, no ground for injunction.  
 227. The rule illustrated; judgment against minor; exception to rule.  
 228. Void judgments; authorities conflicting.  
 229. Judgment void for want of service of process enjoined.  
 229a. Defense to action on which judgment founded.  
 230. Tendency toward adoption of test as to remedy at law.  
 231. Injunction against sale under execution; remedy at law the test.  
 231a. Effect of void judgment on statute of limitations.

§ 225. **Irregularities no ground for injunction.** It is a well established rule that the interference of equity will not be granted for the purpose of correcting mere irregularities or informalities in judicial proceedings. And where a judgment is assailed upon the ground of irregularity in the proceedings antecedent to obtaining the judgment, an injunction will not be allowed.<sup>1</sup> Thus, in the absence of allegations of fraud, irregularities in the service of process will not constitute ground for an injunction, upon the general principle that equity will not sit as a court of review to revise irregularities in proceedings at law.<sup>2</sup> Especially will the relief be refused in such case where the bill admits an indebtedness without offering to pay it.<sup>3</sup> So equity will not restrain an execution for such irregularities as entering up the judgment in the firm name instead of the individual names of the persons composing a part-

<sup>1</sup> *Gardner v. Jenkins*, 14 Md., 58; 51 N. E., 330; *Gum-Elastic R. Co. v. Mexico P. Co.*, 140 Ind., 158, 39 Stites v. Knapp, 2 Ga. Decis., 36; N. E., 443, 30 L. R. A., 700. See *Drake v. Hanshaw*, 47 Iowa, 291; also *Murphree v. Bishop*, 79 Ala., 404. *Clopton v. Carliss*, 42 Ark., 560; 404.

*Devinney v. Mann*, 24 Kan., 682; <sup>2</sup> *Gardner v. Jenkins*, 14 Md., 58; *Galveston, H. & S. A. R. Co. v. Boyd v. Chesapeake*, 17 Md., 195; *Dowe*, 70 Tex., 1; 6 S. W., 790; Stites v. Knapp, 2 Ga. Decis., 36; *Rhodes B. F. Co. v. Mattox*, 135 Windisch v. Gussett, 30 Tex., 744. Ind., 372, 34 N. E., 326, 35 N. E., See *Carter v. Griffin*, 32 Tex., 213. 11; *Hart v. O'Rourke*, 151 Ind., 205, <sup>3</sup> *Gardner v. Jenkins*, 14 Md., 58.

nership, the remedy at law being considered ample by a motion to set aside the judgment.<sup>4</sup> So the enforcement of a judgment rendered in a garnishment suit will not be enjoined upon the ground that the affidavit required by law was not filed, the remedy being by appeal.<sup>5</sup> And it may be laid down as a rule that the powers of equity can not be invoked to restrain execution upon the ground of irregularity, since it is the province of a court of law to annul its own process or correct any errors in its own proceedings concerning executions.<sup>6</sup> Nor, in the absence of fraud, will errors or irregularities in the action of the court warrant an injunction against a judgment,<sup>7</sup> especially when the party complaining might have availed himself of such errors upon an appeal, if prosecuted in due season.<sup>8</sup> And although no remedy be provided by appeal from the judgment of a justice, its enforcement will not be enjoined because of error in the proceedings.<sup>9</sup>

§ 226. **Errors of law, no ground for injunction.** In accordance with the principle noticed in the preceding section, that a court of equity will not sit as a court of errors to revise or correct proceedings at law, an injunction will not be granted against a judgment because of errors in the proceedings at law, or in the rulings of the court, but the judgment will be left to be reversed in a court of review.<sup>10</sup> An additional reason

<sup>4</sup> *McIndoe v. Hazelton*, 19 Wis., 567. But in *Hampson v. Weare*, 4 Iowa, 13, an injunction against an execution was upheld on the ground that the execution was improperly and irregularly issued.

<sup>5</sup> *Hart v. O'Rourke*, 151 Ind., 205, 51 N. E., 330.

<sup>6</sup> *Wagner v. Pegues*, 10 S. C., 259; *Willinson v. Rewey*, 59 Wis., 554; *Hastings v. Cropper*, 3 Del. Ch., 165.

<sup>7</sup> *Neville v. Pope*, 95 N. C., 346.

<sup>8</sup> *Clopton v. Carlross*, 42 Ark., 560.

<sup>9</sup> *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex., 1.

<sup>10</sup> *Stockton v. Briggs*, 5 Jones Eq., 309; *Reynolds v. Horine*, 13 B. Mon., 234; *Dunn v. Fish*, 8 Blackf., 407; *Cassell v. Scott*, 17 Ind., 514; *Gum-Elastic R. Co. v. Mexico P. Co.*, 140 Ind., 158, 39 N. E., 443, 30 L. R. A., 700; *Hart v. O'Rourke*, 151 Ind., 205, 51 N. E., 330; *Rosenberger v. Bowen* 84 Va., 660, 5 S. E., 699; *Commercial Union Assurance Co. v. Scammon*, 133 Ill., 627, 23 N. E., 406.

for refusing the relief upon the ground of error is found in the fact that if the jurisdiction were entertained it would be virtually permitting the error of a court of law to create an equity.<sup>11</sup> Especially where complainant admits the debt to be due will the interposition of equity be refused, although it is alleged that the judgment is erroneous and contrary to law.<sup>12</sup> Even where the error relied upon may have been sufficient to warrant a new trial at law, equity will not interfere.<sup>13</sup> Nor is the fact that a court of law has erred in excluding testimony which should have been admitted sufficient to warrant equity in departing from the rule here laid down.<sup>14</sup> And where a judgment has been affirmed by a court of final resort, which court overlooked a material defect in the proceedings, thereby confirming an erroneous judgment, an injunction will not be granted.<sup>15</sup> And where a court of law has refused an application which was addressed largely to its discretion, equity will not for this reason interfere. Thus, the refusal to grant a motion for a continuance based upon an affidavit will not authorize an injunction against the judgment.<sup>16</sup> Nor will the fact that trifling errors have been committed in assessing the costs of a judgment afford any ground for enjoining the execution.<sup>17</sup> And it would seem that an error in the computa-

<sup>11</sup> *Stockton v. Briggs*, 5 Jones Eq., 309.

<sup>12</sup> *Reeves v. Cooper*, 1 Beas., 223, affirmed on appeal to the Court of Errors and Appeals, *ib.*, 498.

<sup>13</sup> *Reynolds v. Horine*, 13 B. Mon., 234.

<sup>14</sup> *Dunn v. Fish*, 8 Blackf., 407; *Vaughn v. Johnson*, 1 Stockt., 173. In the latter case the court say: "An interference on such ground would convert the court of chancery into a court of errors, and would be an assumption of jurisdiction which does not belong to the court. If the defense is

equally available at law as in equity and the party has had an opportunity of making the defense at law, a court of equity has no jurisdiction to relieve against the judgment, unless some special ground for the relief can be established, other than that of error in law committed by the court which had jurisdiction of the case."

<sup>15</sup> *Nicholson v. Patterson*, 6 Humph., 394.

<sup>16</sup> *Western v. Woods*, 1 Tex., 1.

<sup>17</sup> *Calderwood v. Trent*, 9 Rob. (La.), 227.



tion of interest on the judgment rendered and which it is sought to execute will not warrant an injunction.<sup>18</sup>

§ 227. **The rule illustrated; judgment against minor; exception to rule.** As still further illustrating the general rule above stated, denying relief by injunction against a judgment because of errors in the proceedings at law, it is held that the failure of the court in which the action was pending to appoint a guardian *ad litem* to represent an infant defendant will not of itself warrant an injunction against the judgment, the court having had jurisdiction of the person of the defendant and of the subject-matter of the action.<sup>19</sup> So a judgment of a justice of the peace will not be enjoined because rendered upon evidence which was insufficient to warrant the judgment, when relief may be had at law by *certiorari*.<sup>20</sup> Nor will a judgment rendered by a justice of the peace be enjoined because of alleged errors, when the judgment itself is not a nullity, and where the party aggrieved has neglected to pursue his legal remedy by appeal.<sup>21</sup> So a judgment rendered by a justice of the peace will not be enjoined upon the ground that the case was tried before a jury of twelve instead of six as required by law, since redress should be had for such an irregularity by appeal.<sup>22</sup> Where, however, in an action for a partition of lands and for an adjustment of partnership affairs between some of the parties, the report of the commissioners appointed to make partition and the verdict of the jury are so indefinite and uncertain that it is impossible to determine

<sup>18</sup> Walker v. Villavaso, 26 La. An., 42; Nicklin v. Hobin, 13 Ore., 406, 10 Pac., 835.

<sup>19</sup> Drake v. Hanshaw, 47 Iowa, 291; Levystein v. O'Brien, 106 Ala., 352, 17 So., 550, 30 L. R. A., 707, 54 Am. St. Rep., 56.

<sup>20</sup> Rotzein v. Cox, 22 Tex., 62; Jordan v. Corley, 42 Tex., 284.

<sup>21</sup> Rountree v. Walker, 46 Tex.,

200. But in Texas it is held that a judgment may be enjoined which was rendered upon a written contract payable upon its face in money of the Confederate States. Thompson v. Bohannon, 38 Tex., 241.

<sup>22</sup> Rhodes B. F. Co. v. Mattox, 135 Ind., 372, 34 N. E., 326, 35 N. E., 11.

what is their real intent and meaning, it has been held proper to enjoin their enforcement.<sup>23</sup>

§ 228. **Void judgments; authorities conflicting.** Upon the question of the jurisdiction of a court of equity to enjoin a judgment at law upon the ground of its being absolutely void, in distinction from one which is merely irregular or erroneous, the authorities are exceedingly conflicting, and it is difficult, if not impossible, to harmonize or reconcile them. It has been sought to establish the doctrine upon the distinction above noted, between a void judgment and one which is tainted only with irregularity, that equity may properly enjoin if the judgment is absolutely void, but not if it is merely irregular or erroneous. In other words, the line is attempted to be drawn between judgments which are void and those which are only voidable, the rule thus contended for being that in the former case equity may enjoin, but not in the latter.<sup>24</sup> However reasonable the doctrine thus contended for may appear upon principle, it has not been generally received or adopted by the courts, and, aside from cases where the invalidity of the judgment depends upon want of jurisdiction over the defendant because of want of service of process, which will be noticed hereafter, the courts have frequently refused to interfere by injunction because the judgment was void for want of jurisdiction, or otherwise.<sup>25</sup> The refusal to interfere in cases where the courts have thus withheld relief by injunction has usually been based upon the ground of a remedy at law. Thus, an injunction has been refused against a judgment and execution which were absolutely void, because the remedy at law by application to the court in which the judgment was rendered was regarded as adequate.<sup>26</sup> So

<sup>23</sup> *Butt v. Oneal*, 51 Ga., 358.

*Iowa*, 147; *Smith v. Deweese*, 41

<sup>24</sup> *Earl v. Matheney*, 60 Ind., 202.

*Tex.*, 594; *Glass v. Smith*, 66 *Tex.*,

<sup>25</sup> *Sanchez v. Carriaga*, 31 Cal.,

548, 2 S. W., 195. See also *Cooke*

170; *Crandall v. Bacon*, 20 Wis.,

*v. Burnham*, 32 *Tex.*, 129.

639; *Hart v. Lazonon*, 46 Ga., 396.

<sup>26</sup> *Sanchez v. Carriaga*, 31 Cal.,

See, *contra*, *Connell v. Stelson*, 33

170.

where the judgment is void for want of jurisdiction in the court in which the proceedings were had, it has been held that equity should not interfere by injunction, but should leave the person aggrieved to pursue his legal remedy for redress.<sup>27</sup> Upon the other hand, it is held that a judgment which is void for want of jurisdiction may be enjoined, even though there be a legal remedy by resisting the enforcement of the execution, or otherwise, the legal remedy not being regarded as fully adequate in such cases.<sup>28</sup> And a judgment has been enjoined which was void, because rendered for a sum in excess of the jurisdiction of the court as fixed by statute.<sup>29</sup> So the relief has been granted when the judgment was void because rendered in vacation.<sup>30</sup> And a United States circuit court may enjoin the enforcement of a void judgment rendered by a United States district court in another district.<sup>31</sup> And where the only evidence of a judgment were certain minutes made by the judge and the unapproved form of a judgment submitted by the attorneys to the clerk of the court, it was held that executions based thereon were void, and their levy should be enjoined; and the fact that judgment was afterward regularly entered in the cause before the determination of the injunction suit would not have the effect of making the judgment relate back and give validity to the executions and thus deprive the plaintiff of the right to relief against their enforcement.<sup>32</sup>

§ 229. **Judgment void for want of service of process enjoined.** In cases where the judgment which it is sought to

<sup>27</sup> *Crandall v. Bacon*, 20 Wis., 639; *Hart v. Lazaron*, 46 Ga., 396. <sup>29</sup> *Wilson v. Sparkman*, 17 Fla., 871.

And see, as to defect in jurisdiction, *Stokes v. Knarr*, 11 Wis., 389. <sup>30</sup> *Mitchell v. St. John*, 98 Ind., 598.

<sup>28</sup> *Connell v. Stelson*, 33 Iowa, 147; *Caruthers v. Hartsfield*, 3 Yerg., 366; *Smith v. Deweese*, 41 Tex., 594; *Hilliard v. Chew*, 76 Miss., 763, 25 So. 489. <sup>31</sup> *Kirk v. United States*, 124 Fed., 324.

<sup>32</sup> *Winter v. Coulthard*, 94 Iowa, 312, 62 N. W., 732. See also *Cooke v. Burnham*, 32 Tex., 129.

enjoin is void for want of jurisdiction arising from the want of service of process upon defendant, the courts have manifested less reluctance in granting the desired relief than in the classes of cases already considered. And while it is difficult, upon principle, to discover any satisfactory reason why a judgment which is void because defendant was not served with process and was not subject to the jurisdiction of the court should be enjoined, rather than when the judgment is void for other causes, it is nevertheless true that the courts have been far more liberal in extending their extraordinary aid by injunction in the former class of cases than in the latter.<sup>33</sup> And where a judgment appears to be regular and valid upon its face, but is void because of want of service of process upon the defendant corporation in manner provided by law, and it is shown that the indebtedness is due from another and different corporation, it is held that the judgment may be perpetually enjoined.<sup>34</sup> So equity will enjoin the enforcement of a judgment which is based upon an unauthorized appearance by an attorney purporting to represent complainant; and in such case, a conditional offer by the complainant to pay a certain sum in full satisfaction of the judgment and costs does not constitute such a ratification as to bar him from relief.<sup>35</sup> So when a bill to enjoin a judgment alleges that defendant in the judgment was not indebted to plaintiff in any

<sup>33</sup> See *Hickey v. Stone*, 60 Ill., 458; *Chambers v. King Wrought Iron Bridge Manufactory*, 16 Kan., 270; *Nicholson v. Stephens*, 47 Ind., 185; *Grass v. Hess*, 37 Ind., 193; *Grand Tower Mining Co. v. Schirmer*, 64 Ill., 106; *Blakeslee v. Murphy*, 44 Conn., 188; *Rice v. Tobias*, 89 Ala., 214, 7 So., 765; *Raisin Fertilizer Co. v. McKenna*, 114 Ala., 274, 21 So., 816; *Guess v. Amis*, 54 Ark., 1, 14 S. W., 900; *Gerrish v. Hunt*, 66 Iowa, 682, 24 N. W., 274; *Gerrish v. Seaton*, 73 Iowa, 15, 34 N. W., 485; *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex., 579, 16 S. W., 430; *Kern Barber S. Co. v. Freeze*, 96 Tex., 513, 74 S. W., 303; *Finney v. Clark*, 86 Va., 354, 10 S. E., 569; *Mills v. Scott*, 43 Fed., 452.

<sup>34</sup> *Chambers v. King Manufactory*, 16 Kan., 270. See also *San Juan & St. L. M. & S. Co. v. Finch*, 6 Col., 214.

<sup>35</sup> *Handley v. Jackson*, 31 Ore., 552, 50 Pac., 915, 65 Am. St. Rep., 839.

manner; that no service of process was ever had upon him; that he know nothing of the pendency of the action until execution issued against him, and that if process was returned served it was by mistake or fraud, it is held to be error to dissolve the injunction and dismiss the bill upon motion.<sup>36</sup> And the courts have repeatedly held that judgments recovered before a justice of the peace may be enjoined as void for want of jurisdiction when no proper service of process was had upon the defendant in the action, and when he had no opportunity to defend.<sup>37</sup> Thus, where a judgment was recovered against a corporation upon garnishee proceedings before a justice of the peace, in disregard of the statutory method of obtaining service, so that the justice acquired no jurisdiction over the corporation, thereby rendering all the subsequent proceedings void, an injunction was allowed to prevent the enforcement of the judgment.<sup>38</sup> And it is held that parol evidence is admissible in such case to show the want of notice of pendency of the action.<sup>39</sup> But a judgment regularly obtained by service of process by leaving a copy at defendant's place

<sup>36</sup> *Hickey v Stone*, 60 Ill., 458. But see, as to the effect of a sheriff's return of service of process, in an action to enjoin a judgment for want of service, *Krug v. Davis*, 85 Ind., 309.

<sup>37</sup> *Blakeslee v. Murphy*, 44 Conn., 188; *Grand Tower Mining Co. v. Schirmer*, 64 Ill., 106; *Grass v. Hess*, 37 Ind., 193; *Nicholson v. Stephens*, 47 Ind., 185; *Wagner v. Shank*, 59 Md., 313; *Ryan v. Boyd*, 33 Ark., 778. See, *contra*, *Gates v. Lane*, 49 Cal., 266; *Luco v. Brown*, 73 Cal., 3, 14 Pac., 366; *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex., 47, 11 S. W., 918; *Texas-Mexican R. Co. v. Wright*, 88 Tex., 346, 31 S. W., 613, 31 L. R. A., 200; *St. Louis & S. F. R. Co. v. Lowder*, 138

Mo., 533, 39 S. W., 799, 60 Am. St. Rep., 565; *Missouri, K. & E. R. Co. Hoereth*, 144 Mo., 136, 45 S. W., 1085. In these cases it is held that an execution upon a justice's judgment will not be enjoined because of want of service of process, since the defendant may have adequate relief at law, either by motion in the justice court to stay execution, or by appeal or *certiorari*. And see *Masterson v. Ashcom*, 54 Tex., 324.

<sup>38</sup> *Grand Tower Mining Co. v. Schirmer*, 64 Ill. 106; *McNeill v. Edie*, 24 Kan., 108; *San Juan & St. L. M. & S. Co. v. Finch*, 6 Col., 214.

<sup>39</sup> *Blakeslee v. Murphy*, 44 Conn., 188.



of residence, in accordance with the laws of the state, will not be enjoined, when defendant might have had ample remedy at law, of which he failed to avail himself.<sup>40</sup>

§ 229 a. **Defense to action on which judgment founded.**

Upon the question whether it is necessary for one who seeks to enjoin a judgment as being void for want of service of process, to show that he has a good defense to the action in which the judgment was rendered, the earlier cases displayed the same remarkable conflict of authority which characterizes the whole subject of injunctions against void judgments. Upon the one hand, it was held that, since the judgment was void, no presumption would be indulged in favor of the judgment creditor, and relief was freely granted regardless of the question of defense. Upon the other hand, it was held that, even though the judgment was absolutely void, the party aggrieved was not entitled to relief unless he could show that the final result would be changed. The more recent decisions, however, have set the question at rest, and it may now be stated as a rule, supported by the great weight of authority, that, even though the judgment be entirely void for want of proper service of process, relief will not be granted unless the complainant can show that he has a valid defense to the claim upon which the judgment was founded. The rule as thus announced is not only supported by the decided weight of authority but seems more in accord with the fundamental principles which govern courts of equity in granting equitable relief against the enforcement of judgments.<sup>41</sup> *A fortiori* does

<sup>40</sup> *Hurlbut v. Thomas*, 55 Conn., 181, 10 Atl., 556.

<sup>41</sup> *Winters v. Means*, 25 Neb., 241, 41 N. W., 157; *State v. Hill*, 50 Ark., 458, 8 S. W., 401, overruling upon this point *Ryan v. Boyd*, 33 Ark., 778; *Stewart v. Brooks*, 62 Miss., 492; *Newman v. Taylor*, 69 Miss., 670, 13 So., 831; *Massachusetts B. L. Assn. v. Loh-*

*miller*, 20 C. C. A., 274, 74 Fed., 23; *Rice v. Tobias*, 83 Ala., 348, 3 So., 670; S. C., 89 Ala., 214, 7 So., 765; *Raisin Fertilizer Co. v. McKenna*, 114 Ala., 274, 21 So., 816; *Gifford v. Morrison*, 37 Ohio St., 502; *Sharp v. Schmidt*, 62 Tex., 263; *dicta* in *Gerrish v. Hunt*, 66 Iowa, 682, 24 N. W., 274 and *Gerrish v. Seaton*, 73 Iowa, 15, 34 N. W., 485. And

the rule apply where the judgment is merely voidable as the result of minor irregularities in the service of process.<sup>42</sup> Nor will equity enjoin a judgment because of service which is merely defective as distinguished from that which is entirely void, when it is not shown that the party complaining was in any manner misled by such defect.<sup>43</sup>

§ 230. **Tendency toward adoption of test as to remedy at law.** While the discussion of this branch of the preventive jurisdiction of equity as applied to void judgments, as shown in the preceding sections, has demonstrated a remarkable conflict of authority upon the right to relief by injunction in such cases, the prevailing tendency of the courts seems toward the establishment of the simple test in such cases, of whether ade-

see *Handley v. Jackson*, 31 Ore., 552, 50 Pac., 915, 65 Am. St. Rep., 839. *Contra*, *Blakeslee v. Murphy*, 44 Conn., 188; *Ridgeway v. Bank*, 11 Humph., 523; *Bell v. Williams*, 1 Head, 229; *Mills v. Scott*, 43 Fed., 452. In *Kern Barber S. Co. v. Freeze*, 96 Tex., 513, 74 S. W., 303, the court make the distinction between the case where the fact of the void service of process does not appear upon the face of the record of the judgment and the case where it does so appear, holding that in the latter case, where it does not depend upon evidence *aliunde*, the enforcement of the judgment will be enjoined without any showing of a meritorious defense. And under a statute providing that only so much of any judgment shall be enjoined as complainant shall show that he is equitably not bound to pay, a judgment rendered before a justice of the peace will not be re-

strained for want of service of process when complainant shows no legal or equitable defense to the action. *Colson v. Leitch*, 110 Ill., 504. In *Bankers Life Ins. Co. v. Robbins*, 53 Neb., 44, 73 N. W., 269, it was held that the court should not go into the merits of the complainant's alleged defense further than to determine that a *prima facie* defense is presented. And it may well be questioned whether an exception to the rule as announced in the text should not be recognized where the void judgment has been rendered by a court beyond the jurisdiction of complainant's domicile; otherwise he is compelled to submit his defense to a court which, without his voluntary appearance, could never acquire jurisdiction over him.

<sup>42</sup> *Tootle v. Ellis*, 63 Kan., 422, 65 Pac., 675, 88 Am. St. Rep., 246.

<sup>43</sup> *Hale v. McComas*, 59 Tex., 484.

quate remedy exists at law for the protection of the judgment debtor against the void judgment. Where such remedy exists, either by appeal, *certiorari*, application to the court itself which rendered the judgment, or in any other legal and adequate manner, no satisfactory reason is perceived why equity should depart from the universal rule of withholding its extraordinary aid to redress a grievance which is remediable at law. Upon the other hand, where no adequate or complete relief may be had at law in the usual and accustomed methods of procedure, it is equally difficult to conceive of any satisfactory reason for withholding relief by injunction, since the injury resulting from an absolutely void judgment would be otherwise irreparable. And while the decisions of the courts are, as is already shown, far from being reconcilable, even upon this simple and reasonable test, it is believed that the tendency is towards its ultimate adoption as the true solution of this vexed question.<sup>44</sup>

§ 231. **Injunction against sale under execution; remedy at law the test.** Where the injunction is sought to restrain a sale of one's property under an execution issued upon a judgment alleged to be void, the determining question is as to the existence of a satisfactory legal remedy. And if, in such cases, full relief may be had by applying to the court from which the execution issued, to have it quashed, the injunction will be refused, especially when it is not shown that the persons seeking to enforce the execution are insolvent or unable to respond in damages at law.<sup>45</sup> Nor will the enforcement of an execution be enjoined upon the ground that the judgment and execution do not follow the declaration and verdict and are therefore void, when the person aggrieved has had an opportunity of obtaining relief at law, of which he did not

<sup>44</sup> In West Virginia this test has been adopted. *Railway Co. v. Connor v. Swift*, 9 Nev., 39. See also *Wordehoff v. Evers*, 18 Ryan, 31 West Va., 364, 6 S. E., Fla., 339. But see, *contra*, *Hernandez v. James*, 23 La. An., 483.

<sup>45</sup> *Stockton v. Ransom*, 69 Mo.,

properly avail himself.<sup>46</sup> And when it is sought to restrain a sale of land under execution upon the ground that the judgment is void, it is not sufficient to allege its invalidity in general terms, but the facts should be specifically set forth.<sup>47</sup> It is held, however that creditors who have instituted an action by attachment against their debtor and have levied upon his personal property, may enjoin a sheriff from selling the same property under a prior judgment and execution against the same debtor, which are void for want of jurisdiction in the court over the person of the defendant, the relief being allowed under such circumstances because of the absence of any adequate legal remedy.<sup>48</sup> And the fact that plaintiff in an execution is actually dead at the time of issuing the execution in his name affords sufficient ground for enjoining its enforcement.<sup>49</sup> So where an execution issues in the name of a judgment creditor who is dead, without being properly indorsed in the manner required by statute in such cases, the execution is regarded as invalid, and a sale thereunder may be enjoined.<sup>50</sup>

§ 231 *a*. **Effect of void judgment on statute of limitations.**

Where a judgment is void, as for want of proper service of process, the fact of its rendition does not stop the running of the statute of limitations against the cause of action upon which it was founded.<sup>51</sup>

<sup>46</sup> *Leonard v. Collier*, 53 Ga., 387.

<sup>49</sup> *Daily v. Wynn*, 33 Tex., 614.

<sup>47</sup> *Dumbould v. Rowley*, 113 Ind., 353, 15 N. E., 463.

<sup>50</sup> *Meek v. Bunker*, 33 Iowa, 169.

<sup>48</sup> *Wood v. Stanberry*, 21 Ohio St., 142.

<sup>51</sup> *Kern Barber S. Co. v. Freeze*,

96 Tex., 513, 74 S. W., 303.

## VI. JUDGMENTS UPON USURIOUS CONTRACTS.

- § 232. Judgments not usually enjoined because of usury.  
233. Exceptions to the rule.  
234. Judgment debtor only can take advantage of usury.

§ 232. **Judgments not usually enjoined because of usury.** Although courts of equity and of law both have jurisdiction in matters of usury, yet where a cause has been submitted to the legal forum and there decided, equity will not afterward relieve against the judgment in the absence of any special circumstances of fraud, or complicated and embarrassing facts with which the usury is connected.<sup>1</sup> And the fact that defendant in the action at law upon the usurious contract has had an opportunity to defend on the ground of usury, of which he has failed to avail himself, will estop him from relief in equity, no fraud or misconduct being shown on the part of plaintiff at law.<sup>2</sup> And unless complainant tenders the amount of principal and interest actually due, after deducting the amount alleged to be usurious, he is not entitled to relief, since he who seeks equity must himself do equity.<sup>3</sup>

§ 233. **Exceptions to the rule.** Notwithstanding the rule as above stated is well established, and equity will rarely interfere upon the ground of usury where an opportunity has been neglected of asserting such defense at law, yet there may be cases surrounded with such peculiar circumstances as to render a court of law an inconvenient tribunal, and thus compel a resort to equity. And where the remedy at law is attended with embarrassment and difficulty, the transaction involving a large number of contracts and being exceedingly complex in its nature in consequence of the devices resorted to for the purpose

<sup>1</sup> *Lindsley v. James*, 3 Cold., 477. 49; *Morgan v. England*, Wright,

<sup>2</sup> *Buchanan v. Nolin*, 3 Humph., 112; *Walker v. Gurley*, 83 N. C., 63; *McKoin v. Cooley*, 3 Humph., 429.

559; *Lansing v. Eddy*, 1 Johns. Ch., <sup>3</sup> *Neurath v. Hecht*, 62 Md., 221.



of concealing the usury, a court of equity may properly interfere.<sup>4</sup> And relief has been granted against judgments by confession, upon the ground of usury.<sup>5</sup>

§ 234. **Judgment debtor only can take advantage of usury.** The defense of usury is regarded as in the nature of a personal privilege, to be pleaded only by the debtor himself at his option, and the courts will not attempt in behalf of one creditor to enjoin a judgment recovered by another creditor against the common debtor, in the absence of fraud. The judgment debtor having had his day in court, and not having seen fit to interpose the defense of usury in his own behalf, equity will not permit his other creditors to open up the transaction and to enjoin the collection of the judgment upon the ground that the debtor had paid usurious interest, when no fraud is shown in the transaction as against them.<sup>6</sup>

<sup>4</sup> *Frierson v. Moody*, 3 Humph., 561; *Chester v. Apperson*, 4 Heisk. 639.      <sup>5</sup> *Phillips v. Walker*, 48 Ga., 55; *Gatewood v. City Bank of Macon*, 49 Ga., 45.

<sup>6</sup> *Hill v. Reifsnider*, 46 Md., 555; *Ennis v. Ginn*, 5 Del. Ch., 180.

## VII. OF JUDGMENTS UPON GAMING CONTRACTS.

§ 235. Courts inclined to enjoin judgments on gaming contracts.

236. Defense should usually be made at law.

§ 235. **Courts inclined to enjoin judgments on gaming contracts.** Where the consideration for the contract on which the action at law is founded was money lost at gaming, and judgment is obtained against defendant, courts of equity are inclined to be somewhat more liberal in the exercise of their restraining jurisdiction than in ordinary cases, and upon considerations of public policy and the necessity of the prevention of gaming they will generally restrain proceedings under the judgment.<sup>7</sup> Thus, where defendant in an action upon a gaming contract was prevented by surprise from making his defense available at law, equity will afford relief, even though he made no effort to obtain a new trial at law.<sup>8</sup> So equity will relieve against a judgment based upon a promissory note, a part of the consideration of which was money loaned for gambling purposes.<sup>9</sup> Nor will the fact that the gaming contract has been assigned for value to an innocent holder, ignorant of the origin of the contract, prevent equity from affording relief against the judgment, where gaming is prohibited by statute, even though no defense was interposed

<sup>7</sup> *White v. Washington*, 5 Grat., 645; *Woodson v. Barrett*, 2 Hen. & M., 80; *Skipwith v. Strother*, 3 Rand., 214. *Contra*, *Smith v. Kemmerer*, 152 Pa. St., 98, 25 Atl., 165.

<sup>8</sup> *White v. Washington*, 5 Grat., 645. And it is said by the court in this case that "The case of a gaming promise or security is an exception to the general rule on the subject, that rule being derived from the obligation of the party in most cases to avail himself of his

opportunity to defend himself at law. Whereas in the case of a gaming promise or security he is under no such obligation. And as he may at first waive all defense at law and seek relief in equity, so when he is prevented by surprise from making his defense available at law, he is not bound to pursue it further in that forum, but may resort to equity."

<sup>9</sup> *Emerson v. Townsend*, 73 Md., 224, 20 Atl., 984.

at law.<sup>10</sup> In such case the circulation of gaming contracts or securities is considered an evil of equal magnitude with giving them, and one which authorizes the interference of equity by enjoining proceedings under the judgment.<sup>11</sup>

§ 236. **Defense should usually be made at law.** Although, as we have seen, courts of equity are inclined to look favorably upon applications for relief against judgments obtained upon gaming contracts, yet they are loth to depart from the principle of refusing to interfere where no defense was attempted at law. And it is held that a note given for a gaming consideration, being absolutely void in itself, full and adequate defense may be made at law, and a court of equity will refuse to relieve where there was no attempt at such defense.<sup>12</sup> And in the absence of any excuse for not having defended at law upon a bond given for money lost in gaming, the judgment will not be enjoined.<sup>13</sup>

<sup>10</sup> *Woodson v. Barrett*, 2 Hen. & M., 80; *Skipwith v. Strother*, 3 Rand., 214.

<sup>11</sup> *Woodson v. Barrett*, 2 Hen. & M., 80. But see *Nelson's Adm'r v. Armstrong*, 5 Grat., 354, where it is held that in case of doubt as to whether the judgment creditor to whom the debt was transferred took it in ignorance that it was founded upon a gaming considera-

tion, an injunction already granted will not be dissolved, but will be retained until an issue at law can determine the fact.

<sup>12</sup> *Giddens v. Lea*, 3 Humph., 133. And see *Owens v. Van Winkle G. & M. Co.*, 96 Ga., 408, 23 S. E., 416, 31 L. R. A., 767.

<sup>13</sup> *Jones v. Jones*, N. C. Term R., 110.

## VIII. SET-OFFS.

- § 237. Judgments not usually enjoined because of set-offs.
- 238. Damages recoverable at law no ground for relief.
- 239. Equitable set-offs ground for relief.
- 240. Injunction allowed when defense of set-off prevented by fraud.
- 241. Ignorance of set-off, when ground for injunction; partial set-off.
- 242. Unsettled account; definite amount should be shown; set-off acquired after verdict not allowed.
- 243. Effect of insolvency of judgment creditor.
- 244. Set-off reduced to judgment ground for injunction; equity considers real parties in interest.

### § 237. Judgments not usually enjoined because of set-offs.

While the authorities are not wholly uniform upon the question of the right to enjoin judgments at law upon the ground of set-off, yet the weight of authority unmistakably sustains the proposition that a set-off which may be pleaded at law does not, of itself, warrant an injunction against a judgment. And in accordance with the general principle that equity will not interfere where there is ample remedy at law and where a court of law has first obtained jurisdiction of the subject-matter, a judgment will not usually be enjoined upon the ground of off-sets which might have been interposed in defense of the legal action.<sup>1</sup> And where there is no allegation in the bill

<sup>1</sup> *Hendrickson v. Hinckley*, 17 How., 443; *Rives v. Rives*, 7 Rich. Eq., 353; *Cummins v. Bentley*, 5 Ark., 9; *George v. Strange*, 10 Grat., 499; *Winchester v. Grosvenor*, 48 Ill., 517; *Cook v. Murphy*, 7 Gill & J., 282; *Halcomb v. Kelly*, 57 Tex., 618; *Twigg v. Hopkins*, 85 Md., 301, 37 Atl., 24. But see, *contra*, *Hughes v. McCoun*, 3 Bibb, 254, where it is held that a set-off, being matter of equitable as well as legal jurisdiction, and not specially cognizable in a court of law, may be relied upon to enjoin a judgment, even where it was not pleaded at law and no excuse is offered for not pleading it there. And in *Chicago, D. & V. R. Co. v. Field*, 86 Ill., 270, it is held, in opposition to the doctrine of the text, that the case of set-offs presents an exception to the general rule denying relief by injunction against judgments upon grounds which might have been urged in defense of the action at law. And the exception is said to

that the person aggrieved was prevented from using his set-off in the action at law by some unavoidable occurrence, or that he possessed no other evidence by which to establish his set-off than the testimony of the opposite party, an injunction will not be allowed.<sup>2</sup> So a sale under a judgment will not be enjoined upon the ground of set-off, when the alleged set-off is wholly independent of and has no connection with the cause of action upon which the judgment was rendered, and when it is not shown that the judgment creditor is insolvent.<sup>3</sup> Nor will equity restrain proceedings under a judgment on the ground of a set-off in respect to distinct and unconnected debts, in the absence of any other circumstances calling for the aid of the court.<sup>4</sup> And where a court of law, having full jurisdiction of the subject-matter and having fully considered the case, has refused to allow a set-off, equity will not afterward assume jurisdiction and restrain the judgment.<sup>5</sup>

§ 238. **Damages recoverable at law no ground for relief.**

Claims for damages sustained by breach of warranty on the sale of property and for money loaned, which might have been set off in defense of an action at law, afford no ground for restraining proceedings under the judgment in the absence of fraud, accident or mistake.<sup>6</sup> So, too, damages resulting

rest upon the fact that statutes of set-off are not imperative, but only permissive, and defendant is not bound to set off his demand against plaintiff's action. His failure, therefore, to plead his set-off at law will not, it is held, prevent him from maintaining a bill in equity to enjoin the judgment upon the ground of set-off.

<sup>2</sup> *Cummins v. Bentley*, 5 Ark., 9.

<sup>3</sup> *Baker v. Ryan*, 67 Iowa, 708. 25 N. W., 890.

<sup>4</sup> *Dade v. Irwin's Ex'r*, 2 How., 383.

<sup>5</sup> *Simpson v. Hart*, 1 Johns. Ch., 91. Kent, Ch., in passing upon the

case, says: "Where courts of law and equity have concurrent jurisdiction over a question and it receives a decision at law, equity can no more re-examine it than the courts of law, in a similar case, could re-examine a decree of the court of chancery. \* \* \* It is the unfitness and vexation and indecorum of permitting a party to go on successively by way of experiment from one concurrent tribunal to another and thus to introduce conflicting decisions, that prevents the second inquiry."

<sup>6</sup> *Winchester v. Grosvenor*, 48 Ill., 517.



from the wrongful attachment of one's property do not authorize an injunction against the judgment, since ample remedy exists at law by proceedings upon the attachment bond.<sup>7</sup>

§ 239. **Equitable set-offs ground for relief.** As regards set-offs which are purely equitable in their nature, in distinction from strictly legal set-offs, it would seem that they need not be pleaded at law, and defendant who has not urged them in defense of the action may, after judgment obtained, come into equity and restrain the judgment on establishing his equitable set-offs.<sup>8</sup> So an equitable set-off which the judgment debtor could not have pleaded under the rules of law in defense of the action may entitle him to an injunction against the enforcement of the judgment, when the judgment creditor is insolvent. And the injunction may be allowed under such circumstances, even as against assignees of the judgment, since they stand in no better position than the original judgment creditor himself, and are subject to the same equities.<sup>9</sup> So proceedings under a judgment will be restrained upon the ground of an equitable set-off, even though for unliquidated damages, where the one against whom it is claimed is a non-resident and insolvent.<sup>10</sup> But, notwithstanding this apparent exception to the general rule, a judgment will not be enjoined upon the ground of other transactions between the parties upon which there is possibly an equitable set-off.<sup>11</sup>

§ 240. **Injunction allowed when defense of set-off prevented by fraud.** Although equity will not, as we have seen, enjoin proceedings under a judgment on the ground of set-off

<sup>7</sup> *Winchester v. Grosvenor*, 48 Ill., 517. See also *Railroad v. Greer*, 87 Tenn., 698, 11 S. W., 931.

<sup>8</sup> *Richmond & S. R. Co. v. Shippen*, 2 Pat. & H., 327; *Hall v. Hickman*, 2 Del. Ch., 318. But see *Hudson v. Kline*, 9 Grat., 379. <sup>10</sup> *North Chicago Rolling Mill Co. v. St. Louis Ore and Steel Co.*, 152 U. S., 596, 14 Sup. Ct. Rep., 710, reversing, S. C., 39 Fed., 308.

<sup>9</sup> *Marshall v. Cooper*, 43 Md., 46. <sup>11</sup> *Parks v. Spurgin*, 3 Ired. Eq., 153.

where the defendant has neglected to avail himself of the opportunity to defend at law, yet if through fraud, collusion, or other improper conduct of the plaintiff, he has been induced to omit his defense, the judgment may be enjoined, defendant in the action at law having been guilty of no laches on his part.<sup>12</sup> Thus, where a judgment was obtained in violation of a written agreement that complainant's set-off should be credited on the note in suit and that the suit itself should be dismissed, an injunction has been allowed.<sup>13</sup> And where defendant in the action at law has a good off-set to the demand, of which he was prevented from availing himself by the fraud and collusion of plaintiffs, unmixed with negligence or laches of his own, a bill alleging these facts is not demurrable for want of equity.<sup>14</sup>

§ 241. **Ignorance of set-off, when ground for injunction; partial set-off.** Ignorance may sometimes afford sufficient excuse for not having pleaded the set-off in defense of the suit at law. And where a judgment has been recovered against an administrator, who afterward discovers set-offs and credits to which his intestate was entitled, but of whose existence defendant was wholly ignorant at the time of trial, equity will enjoin proceedings under the judgment.<sup>15</sup> But a partial set-off against a judgment will not justify a court in enjoining the entire amount of the judgment.<sup>16</sup> And when an injunction is granted because of a set-off which is less than the whole amount of the judgment, it should be with the proviso that the judg-

<sup>12</sup> Allen *v.* Medill, 14 Ohio, 445; Davis *v.* Tileston, 6 How., 114; Dickenson *v.* McDermott, 13 Tex., 248.

<sup>13</sup> Dickenson *v.* McDermott, 13 Tex., 248.

<sup>14</sup> Davis *v.* Tileston, 6 How., 114.

<sup>15</sup> Terrill *v.* Southali, 3 Bibb, 458. But see, *contra*, Hudson *v.* Kline, 9 Grat., 379, where it is held that,

although defendant is prevented by unavoidable accident from availing himself of off-sets in defense of the action at law, he is still not entitled to enjoin the judgment, but must pursue his remedy at law for the recovery of his demands.

<sup>16</sup> Palfrey *v.* Shuff, 2 Mart. N. S., 51.

ment creditor may proceed by execution to collect the undisputed balance of his judgment.<sup>17</sup>

§ 242. **Unsettled account; definite amount should be shown; set-off acquired after verdict not allowed.** The mere existence of cross demands is not of itself sufficient to constitute an equitable set-off, or to warrant an injunction, and a court of equity will not on the ground of an open and unsettled account between the parties, restrain a judgment creditor from profiting by his judgment.<sup>18</sup> And it is error to enjoin the enforcement of a judgment upon the ground of an alleged set-off or counter claim when no precise or definite amount is shown to be due thereon.<sup>19</sup> And a set-off or counter demand acquired after verdict, although greater than the amount of the verdict, will not authorize an injunction against the proceedings, since it would be manifestly unjust that plaintiff should be delayed or hindered in obtaining the benefit of his verdict by interposing a claim not yet established at law.<sup>20</sup>

§ 243. **Effect of insolvency of judgment creditor.** The question of whether the insolvency of the judgment creditor will, of itself, justify an injunction against the enforcement of a judg-

<sup>17</sup> *Hodges v. Planters Bank*, 7 Gill & J., 306; *Levy v. Steinbach*, 43 Md., 212.

<sup>18</sup> *Rawson v. Samuel*, 1 Cr. & Ph., 161. See also *Hewitt v. Kuhl*, 10 C. E. Green, 24; *Townsend v. Quinan*, 36 Tex., 548.

<sup>19</sup> *Faison v. McIlwaine*, 72 N. C., 312.

<sup>20</sup> *Whyte v. O'Brien*, 1 Sim. & Stu., 551. "The question," says Vice Chancellor Leach, "is whether a bill of this kind can be maintained. At law, where a defendant claims a set-off, the truth of his claim comes to be tried at the same time with the demand raised by the action, and is decided by the same verdict. If, after the

verdict, the defendant acquires for the first time a cross demand against the plaintiff, he can not, for that reason, by any proceeding at law, defeat or delay the plaintiff from the benefit of his verdict. It is not reasonable that a cross demand thus subsequently acquired, should delay the plaintiff from the benefit of his verdict, until the validity of this demand is ascertained by a second trial; and in this case equity must follow the law. Equitable set-off is where by reason of the nature of the cross demand, there can be no set-off at law. Here the demand is purely legal."

ment at law, upon the ground of set-off, especially when the set-off is of such a nature that it might have been pleaded at law, is one upon which there has been some conflict of judicial opinion. The affirmative of the proposition has been broadly asserted, and it has been held that such insolvency affords sufficient reason for enjoining the judgment, although the set-off was of such a character that it might have been urged in defense of the suit at law.<sup>21</sup> And where the judgment creditor is indebted to the judgment debtor largely in excess of the judgment which he has obtained against him, and refuses to allow his judgment to be set off against such indebtedness, it has been held proper to enjoin the judgment, upon the ground that its enforcement under such circumstances would be unconscientious and a violation of moral duty.<sup>22</sup> Upon the other hand, it has been held that insolvency of the judgment creditor will not, alone, warrant an injunction against proceedings under a judgment on account of a set-off which might have been urged in defense of the original action.<sup>23</sup> Disregarding the unsettled condition of the authorities upon this point, the true doctrine, upon principle, would seem to be that while insolvency of itself rarely, if ever, justifies the granting of an injunction in any case, it is yet an important factor to be considered in this class of cases, and may with other grounds of equitable relief justify the interposition of the extraordinary process of injunction.

§ 244. **Set-off reduced to judgment ground for injunction; equity considers real parties in interest.** In those cases where

<sup>21</sup> *Levy v. Steinbach*, 43 Md., 212; *Jarrett v. Goodnow*, 39 West Va., 602, 20 S. E., 575, 32 L. R. A., 321; was urged as a defense to the action at law.

<sup>22</sup> *Rives v. Rives*, 7 Rich. Eq., 353; *Sayre's Adm'r v. Harpold*, 33 West Va., 553, 11 S. E., 16; *Zinn v. Dawson*, 47 West Va., 45, 34 S. E., 784, 81 Am. St. Rep., 772. But see, *contra*, *Jarrett v. Goodnow*, 39 West Va., 602, 20 S. E., 575, 32 L. R. A., 321.

<sup>23</sup> *Payne v. Loudon*, 1 Bibb, 518. But it does not appear from the case reported whether the set-off

the set-off which is urged as the foundation for relief by injunction has been reduced to judgment stronger ground is afforded for the interference sought, and in such cases it is regarded as proper to grant the injunction.<sup>24</sup> And where a judgment debtor, himself having an unsatisfied judgment against his creditor, files a bill to set off the one judgment against the other, alleging that his judgment creditor is insolvent and that he will be remediless if the judgment is permitted to be enforced against him, and praying an injunction to prevent such enforcement and a decree of set-off, the bill is not demurrable for want of equity.<sup>25</sup> And since the jurisdiction exercised by courts of equity over matters of set-off is somewhat broader than that of courts of law, equity may in cases of the nature under discussion look beyond the nominal to the real parties in interest and may give relief accordingly. It will not, therefore, permit a *cestui que trust* who is insolvent to enforce and collect through his trustee a judgment against one who himself holds a valid judgment against the *cestui que trust* which he is powerless to collect if the set-off be denied, and such attempted collection will be enjoined in a suit to off-set the one judgment against the other.<sup>26</sup> Independently, however, of circumstances of the nature above disclosed, equity will not ordinarily enjoin the enforcement of a judgment upon a bill seeking to off-set certain judgments against each other when the judgments are not between the same parties.<sup>27</sup>

<sup>24</sup> Williams v. Davies, 2 Sim., 461.

<sup>26</sup> Hobbs v. Duff, 23 Cal., 596.  
See S. C., 43 Cal., 485.

<sup>25</sup> Tommy v. Ellis, 41 Ga., 260.

<sup>27</sup> Boley v. Griswold, 2 Mont., 447.



## IX. JUDGMENTS AS AFFECTING TITLE

- § 245. Judicial sales not enjoined for irregularity in proceedings.  
246. Sale of property on execution against a third person.  
247. Exception to the general rule.  
247a. No injunction upon grounds available at law.  
248. Equity will interfere to prevent a cloud upon title.  
249. But not if title is good upon its face.  
250. Failure of title a ground of injunction against judgment for purchase money.  
251. Mere apprehensions of possible failure not sufficient.  
252. Fraud and improper conduct of judgment creditor.  
253. Writs of restitution and possession.  
254. Judgment in another county; ejectment by mortgagee.  
255. Prior lien; growing crops.  
256. Surety in replevin bond; purchaser of surety's land.  
257. Of parties.  
258. When injunction retained to hearing; garnishees under attachment proceedings.  
259. Excessive levy; time of sale unpropitious.  
260. Judgment for possession.  
261. Sale under fraudulent judgments enjoined; inaccurate description no ground for injunction.  
262. Buildings erected by debtor on creditor's land; mortgagee of farming utensils and crops.  
263. When judgment for purchase money enjoined.  
264. Voluntary assignment; sale of debtor's real estate not enjoined.  
264a. Sale under execution from foreign court.

§ 245. **Judicial sales not enjoined for irregularity in proceedings.** The aid of equity is not infrequently sought for the purpose of enjoining proceedings under judgments at law against the real estate of the judgment debtor. With reference to such cases, it is to be remarked, in the first instance, that a sale of real estate under legal process will not be restrained on account of defects and irregularities in the proceedings by which judgment was obtained, but some actual injury or apprehension of injury must be shown<sup>1</sup> Nor will equity interpose to prevent the enforcement of judgments rendered against

<sup>1</sup> *Morgan v. Whiteside's Curator*, 14 La., 277; *Ewing v. St. Louis*, 5 Wal., 413.

complainant for the amount of alleged benefit to his property by the opening of certain streets, because of irregularities in the proceedings, the remedy being at law, and equity having no disposition to restrain the proceedings of inferior tribunals of special jurisdiction.<sup>2</sup>

§ 246. **Sale of property on execution against a third person.**

Upon the general principle that courts of equity will not entertain jurisdiction where ample remedy exists at law, an injunction will not be allowed against a sale of property levied upon in satisfaction of an execution against a person other than the owner of the property.<sup>3</sup> And a judgment debtor can not enjoin the creditor from levying his execution upon real estate belonging to a third person, who is not a party to the suit and who does not himself seek for the relief, there being ample remedy at law for any injury which he may sustain.<sup>4</sup> A distinction, however, is taken between the case where complainants are owners of the legal and where they are owners of the equitable title to the property about to be sold; since in the case of legal ownership the remedy at law is sufficient, but where the title is merely equitable, courts of law are pow-

<sup>2</sup> *Ewing v. St. Louis*, 5 Wal., 413. Mr. Justice Field, delivering the opinion of the court, says: "With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases, the review and correction of the proceedings must be obtained by the writ of *certiorari*. This is the general and well established doc-

trine." See also *Mayor v. Meserole*, 26 Wend., 132, reversing S. C., 8 Paige, 198; *Heywood v. Buffalo*, 4 Kear., 534.

<sup>3</sup> *Freeman v. Elmendorf*, 3 Halst. Ch., 475, affirmed on appeal, Ib., 655; *Watkins v. Logan*, 3 Monr., 21; *Bouldin v. Alexander*, 7 Monr., 425; *Coughron v. Swift*, 18 Ill., 414; *Henderson v. Morrill*, 12 Tex., 1; *Carlin v. Hudson*, Ib., 202; *Hall v. Davis*, 5 J. J. Marsh., 290. But see, *contra*, *Brummel v. Hurt*, 3 J. J. Marsh., 709; *Downing v. Mann*, 43 Ala., 266; *Bach v. Goodrich*, 9 Rob. (La.), 391; *Scobey v. Walker*, 114 Ind., 254, 15 N. E., 674.

<sup>4</sup> *Tompkins v. Tremlin*, 49 Ga., 460.

erless to afford the necessary relief, and equity will entertain jurisdiction to restrain the sale.<sup>5</sup>

§ 247. **Exception to the general rule.** Notwithstanding the general rule as above laid down, it has been held that the grantor of real estate with covenants of warranty has such an interest in restraining a sale of the land under a judgment against a former owner, alleged to have been paid, as to make him a proper party to apply for an injunction.<sup>6</sup> But the purchaser of lands can not restrain their sale under a judgment obtained by fraud against his grantor, without showing affirmatively that he will be injured thereby.<sup>7</sup>

§ 247 a. **No injunction upon grounds available at law.** In accordance with the general principle that equity will not relieve where there is ample redress at law, an injunction will not be granted to restrain the enforcement of a judgment directing the sale of real estate, where the relief is sought upon grounds which might have been urged as a defense to the proceeding in which the judgment was rendered.<sup>8</sup>

§ 248. **Equity will interfere to prevent a cloud upon title.** Courts of equity frequently enjoin proceedings under judgments for the prevention of a cloud upon title, and this would seem to follow, by analogy, from the well settled and recognized jurisdiction of equity to remove clouds upon title. Since, if the court may, for the purpose of preventing litigation and expense, entertain jurisdiction for the removal of a cloud upon title, it is difficult to perceive any substantial reason why the same jurisdiction may not be exercised to prevent such a cloud. And it may, therefore, be laid down as a general rule that a sale of real estate under execution, which will not, at law, confer any title on the purchaser, and whose only effect will be to cast a cloud upon the title of a *bona fide* purchaser,

<sup>5</sup> Orr v. Pickett, 3 J. J. Marsh., 269.

<sup>6</sup> McCulloch v. Hollingsworth, 27 Ind., 115.

<sup>7</sup> Marriner v. Smith, 27 Cal., 649.

<sup>8</sup> Rucker v. Langford, 138 Cal., 611, 71 Pac. 1123; Alexander v. Fransham, 26 Mont., 496, 68 Pac., 945.

may be enjoined.<sup>9</sup> Nor in the application of the rule will it avail against the issuing of an injunction that the levy was made only upon the right, title and interest of the complainant.<sup>10</sup>

§ 249. **But not if title is good upon its face.** The exercise of the jurisdiction of equity to prevent a cloud upon title proceeds upon the assumption that the title of the person complaining, being shown as it appears of record, the cloud to be removed or prevented is apparently a good title against that of complainant, though in reality defective by reason of facts *dehors* the record. An injunction will, therefore, not be allowed to restrain a sale under a judgment in foreclosure to prevent the establishment or assertion of a title which can only be shown to be *prima facie* good by leaving complainant's title out of consideration.<sup>11</sup> So if the invalidity which is charged to be a cloud upon the title appears upon the face of the record itself, as in the case of an award for the partition of lands which is invalid upon its face, equity will not interfere to set it aside.<sup>12</sup> As between two judgment creditors, where the prior creditor has received full payment and satisfaction of his judgment, but still attempts to enforce executions thereunder to the prejudice of the junior creditor, such a cloud is thereby thrown upon the title to the debtor's estate as will authorize an injunction in behalf of the junior judgment creditor.<sup>13</sup>

§ 250. **Failure of title a ground of injunction against judgment for purchase money.** Failure or want of title is fre-

<sup>9</sup> *Christie v. Hale*, 46 Ill., 117; for a general discussion of the subject *Pettit v. Shepherd*, 5 Paige, 493; *Key C. G. L. Co. v. Munsell*, 19

Iowa, 305; *Bank of U. S. v. Schultz*, 2 Ohio, 505; *Norton v. Beaver*, 5 Ohio, 178; *King v. Clay*, 34 Ark., 291. See also *Bishop v. Moorman*, 98 Ind., 1. But see, *contra*, *Coughron v. Swift*, 18 Ill., 414. And see, *post*, § 372 *et seq.*

<sup>10</sup> *Key C. G. L. Co. v. Munsell*, 19 Iowa, 305.

<sup>11</sup> *Moore v. Cord*, 14 Wis., 213; *Gamble v. Loop*, 14 Wis., 465.

<sup>12</sup> *Meloy v. Dougherty*, 16 Wis., 269.

<sup>13</sup> *Shaw v. Dwight*, 16 Barb., 536.

quently relied upon as the foundation for an injunction against proceedings under a judgment to enforce the collection of the purchase money of real estate, and a complete failure of title is in some cases regarded as ground for an injunction. And where the vendor has stripped himself of all title to the premises, either legal or equitable, and is in no condition to comply with his contract to convey, neither he, nor his assignees standing in his stead, will be allowed to recover the purchase money, and a judgment therefor will be perpetually enjoined.<sup>14</sup> So where three tracts of land were sold, the title proceeding from three different sources, one of which entirely failed, there being no such tract in existence, and the other tract proved deficient in amount, a judgment for the purchase money was enjoined to the extent of the deficiency in the land.<sup>15</sup> And a distinction is taken between a mere deficiency in quantity and the absolute non-existence of the real estate conveyed; for, while the relief might be denied in the former case, the latter is sufficient to authorize an injunction.<sup>16</sup> But where the vendor, in addition to his failure to give possession of part of the property at the time stipulated, has utterly failed to make any conveyance of the property, an injunction will issue.<sup>17</sup>

§ 251. **Mere apprehensions of possible failure not sufficient.**

To warrant the exercise of the jurisdiction in restraint of judgments for purchase money, mere apprehensions of a possible failure of title will not suffice, especially where complainant is still in possession of the premises.<sup>18</sup> And he who comes into equity for relief against a judgment for unpaid purchase money must himself be free from negligence. Thus, where a purchaser has neglected, during the life-time of the vendor, to pay the purchase money and obtain a conveyance, he will not

<sup>14</sup> *Buchanan v. Lorman*, 3 Gill, 51.

<sup>15</sup> *Strodes v. Patton*, 1 Marsh. Dec., 228.

<sup>16</sup> *Strodes v. Patton*, 1 Marsh. Dec., 228.

<sup>17</sup> *Hilleary v. Crow*, 1 Har. & J., 542.

<sup>18</sup> *Truly v. Wanzer*, 5 How., 141.



be allowed to enjoin the judgment because of the difficulty of obtaining title from the infant heirs of the vendor, whom he has not made parties to his bill.<sup>19</sup> And where a judgment for purchase money is enjoined until the grantor perfects his title and the injunction is then dissolved, damages should not be allowed against complainant.<sup>20</sup>

§ 252. **Fraud and improper conduct of judgment creditor.** Fraud and negligence on the part of the judgment creditor in the enforcement of his lien against the property of his debtor may, under certain circumstances, create an equity sufficient to warrant an injunction against further proceedings under the judgment. Thus, where parties have stipulated in writing that they will not enforce their judgment lien against certain real estate of the judgment debtor, and afterward, in violation of their agreement, attempt its enforcement, they will be restrained by injunction.<sup>21</sup> So where the judgment creditor may collect his judgment from property that his debtor has not conveyed, but refuses or neglects so to do, he will be enjoined from proceeding to enforce his judgment out of property which has passed to the grantee of his debtor, and as to which the creditor has waived his lien.<sup>22</sup> And a subsequent *bona fide* purchaser may enjoin a sale of premises where the lien created by statute in favor of the judgment creditor has expired by lapse of time without sale being had.<sup>23</sup> Equity will not, however, enjoin a judgment creditor from enforcing his execution out of lands of the debtor, in the hands of a purchaser, merely on the ground of delay in the enforcement of the judgment, the lien not having expired.<sup>24</sup>

§ 253. **Writs of restitution and possession.** In general the enforcement of a legal right will not be enjoined in equity, except upon a clear showing of a right superior to that which it

<sup>19</sup> Prout v. Gibson, 1 Cranch C. C., 389.

<sup>20</sup> Fishback v. Williams, 3 Bibb, 342.

<sup>21</sup> Reily v. Miami E. Co., 5 Ohio, 333.

<sup>22</sup> Hurd v. Eaton, 28 Ill., 122.

<sup>23</sup> Riggin v. Mulligan, 4 Gilman., 50

<sup>24</sup> Wagner v. Pegues, 10 S. C., 259

is sought to enjoin. Therefore a person in possession of real estate without legal title, has not sufficient equities as against the legal owner to entitle him to an injunction against a writ of restitution which has been awarded the legal owner for the purpose of obtaining possession of his premises.<sup>25</sup> But a perpetual injunction will be allowed to restrain the execution of a writ of *habere facias possessionem* against complainant's real estate when he was not a party to the litigation.<sup>26</sup> In general, however, questions of title being properly triable at law, equity will not interfere to restrain a sale of real estate under execution, the title to which is in dispute, but will leave the parties to pursue their remedy in a legal forum.<sup>27</sup>

§ 254. **Judgment in another county; ejectment by mortgagee.**

The existence of a judgment in another county against the same defendant as garnishee will not warrant an injunction to prevent the judgment creditors from obtaining their money by a sale of mortgaged premises under a decree in foreclosure against the defendant, since he is not entitled to an injunction against the collection of the money under the decree, unless he alleges satisfaction of the judgment in the other county.<sup>28</sup> Nor will a court of equity before a hearing enjoin a mortgagee who has recovered judgment in ejectment for the mortgaged premises from proceeding with an execution on his judgment.<sup>29</sup> Where, however, a judgment creditor is attempting to enforce his judgment by a sale of real estate conveyed in trust by the judgment debtor before the debt was incurred, an injunction may be granted against the proceedings until the question of whether the trust was created in fraud of creditors is settled.<sup>30</sup>

<sup>25</sup> Boinay v. Coats, 17 Mich., 411.

<sup>26</sup> Goodnough v. Sheppard, 28 Ill., 81; Williamson v. Russell, 18 West Va., 612.

<sup>27</sup> Freeman v. Elmendorf, 3 Halst. Ch., 475, affirmed on appeal

to the Court of Errors and Appeals, Ib., 655.

<sup>28</sup> Dunham v. Collier, 1 Greene (Iowa), 54.

<sup>29</sup> Todd v. Pratt, 1 Har. & J., 465.

<sup>30</sup> McCann v. Taylor, 10 Md., 418.

§ 255. **Prior lien; growing crops.** One who holds a prior lien on lands can not enjoin a subsequent judgment creditor from attempting the enforcement of his judgment by execution; and this for the reason that a sale under such execution would not defeat or impair the prior lien, but would leave it in the same condition as if such sale had never taken place.<sup>31</sup> But purchasers at a foreclosure sale, being entitled to the then growing crops, may restrain the creditors of the mortgagor from proceeding under execution to levy upon such crops, the doctrine of emblements having no application to purchasers under a foreclosure.<sup>32</sup>

§ 256. **Surety in replevin bond; purchaser of surety's land.** A surety in a replevin bond is not entitled to an injunction to prevent the levy of an execution on his own property until that of his principal shall have been levied upon, such proceeding for the purpose merely of saving the property of the surety by compelling a levy upon that of the principal being regarded as without the sanction of either principle, practice or authority.<sup>33</sup> Upon the other hand, it is held that, where a judgment has been procured against the principal and his surety, a purchaser of the surety's land, upon which the judgment was a lien, may enjoin the sale of the land until the property of the principal has first been subjected to the payment of the judgment.<sup>34</sup>

§ 257. **Of parties.** A commissioner in chancery may, in a proper case, be restrained from executing a sale of lands under a decree, he being regarded as a sheriff under the same circumstances.<sup>35</sup> But the court will not, in an injunction against a decree, inquire into the rights of parties existing antecedent to the rendering of the decree, and which might have been inquired into at that time.<sup>36</sup>

<sup>31</sup> *Union Bank v. Poultney*, 8 Gill & J., 324.

<sup>32</sup> *Crews v. Pendleton*, 1 Leigh, 297.

<sup>33</sup> *Kilpatrick v. Tunstall*, 5 J. J. Marsh., 80.

<sup>34</sup> *Hill v. Crowley*, 55 Ark., 450, 18 S. W., 540.

<sup>35</sup> *People, etc. v. Gilmer*, 5 Gilm., 242.

<sup>36</sup> *Id.*

§ 258. **When injunction retained to hearing; garnishees under attachment proceedings.** When an injunction is sought to restrain the sale of real estate under execution, which it is claimed was released by a written agreement from the lien of the judgment, but the terms of the agreement are doubtful and the affidavits upon the motion for the injunction are conflicting, it is proper to retain the injunction to the hearing, especially when the proceedings in equity will have the result of quieting the title and preventing a multiplicity of suits by one final decree.<sup>37</sup> Where, however, an attaching creditor releases the land attached from the lien of his judgment upon the payment of a given sum of money by strangers to the action, such payment being made not as a payment upon the judgment, but to procure the release of the land from such lien, garnishees under the attachment proceeding are not thereby entitled to enjoin the enforcement of executions against them as garnishees.<sup>38</sup>

§ 259. **Excessive levy; time of sale unpropitious.** A judgment debtor is not entitled to an injunction to prevent the sale of his real estate under execution because the sheriff has levied upon property whose value is largely in excess of the amount of the judgment, and because the debtor has other property amply sufficient to satisfy the execution, when it is not shown that the debtor pointed out such other property to the sheriff, and when the bill itself fails to point out such other property.<sup>39</sup> Nor does the fact that the time of sale is unpropitious and that financial affairs are stringent constitute sufficient ground for equitable interference by injunction against a sale of real estate under a judgment at law.<sup>40</sup>

§ 260. **Judgment for possession.** A defendant in an action of forcible entry and detainer, against whom judgment is ren-

<sup>37</sup> *Kendall v. Dow*, 46 Ga., 607. See also *Muller v. Bayly*, 21 Grat.,

<sup>38</sup> *Hiller v. Cotter*, 54 Miss., 551. 521; *Caperton v. Landcraft*, 3 West

<sup>39</sup> *Smith v. Frederick*, 32 Tex., 256. Va., 540; *Miller v. Parker*, 73 N. C., 58.

<sup>40</sup> *Poullain v. English*, 57 Ga., 492.

dered, can not have an injunction to prevent the issuing and execution of an order of removal, merely upon the ground that he proposes to appeal from the judgment within the time fixed by law, when he has not already appealed.<sup>41</sup> And where a judgment for the delivery of possession of real property has already been enforced and the successful party is in possession thereunder, it is too late to enjoin the enforcement of the judgment; and in such case equity will not interfere by injunction *in limine* to restore possession of the property.<sup>42</sup>

§ 261. **Sale under fraudulent judgments enjoined; inaccurate description no ground for injunction.** The aid of an injunction may be properly invoked to prevent a sale of real property under judgments which have been fraudulently recovered. And a purchaser at a former sale under several executions may enjoin a sale of the same lands under an execution issued upon a fraudulent judgment, even though one of the executions under which complainant claims was issued upon such fraudulent judgment. Under such circumstances it is regarded as proper to enjoin the attempt of the creditor having the fraudulent judgment to sell the land a second time, such relief being essential for the protection of the interest acquired by the purchaser at the former sale.<sup>43</sup> But a sale of real estate under execution will not be enjoined merely because of inaccuracies and insufficiencies in the description of the premises to be sold, since if the description is insufficient there can be no valid sale and plaintiff can not be injured.<sup>44</sup>

§ 262. **Buildings erected by debtor on creditor's land; mortgagee of farming utensils and crops.** Where a judgment debtor has erected buildings upon the land of his judgment

<sup>41</sup> *Curd v. Farrar*, 47 Iowa, 504. *Land Co. v. Turman*, 53 Tex., 619. As to the right of a third person purchasing the legal title to restrain the enforcement of a judgment in forcible entry and detainer by an insolvent landlord against a tenant of the premises, see Texas

*Land Co. v. Turman*, 53 Tex., 619.

<sup>42</sup> *Kamm v. Stark*, 1 Sawy., 547.

<sup>43</sup> *Ragland v. Cantrell*, 49 Ala., 294.

<sup>44</sup> *Henderson v. Hoy*, 26 La. An., 156; *Dewille v. Hayes*, 23 La. An., 550.



creditors, he can not enjoin the creditors from selling such buildings under execution.<sup>45</sup> But the owner of farming lands, who has a mortgage upon the stock and utensils of his tenant, as well as upon the interest of the tenant in the crops being raised thereon, has been allowed an injunction to prevent a sale under execution against the tenant of his equity in the property thus mortgaged, the relief being extended upon the ground of irreparable injury and the difficulty of estimating the damages at law which would result from permitting such sale.<sup>46</sup>

§ 263. **When judgment for purchase money enjoined.** It is also held, where a creditor is seeking to enforce his judgment by a sale of land subject to the lien of the judgment, but which has been conveyed by the debtor to a purchaser who is in possession, not having paid all the purchase money, and the creditor also obtains judgment in garnishee proceedings against the purchaser for the unpaid purchase money, that it is inequitable to permit him to enforce both judgments at one and the same time. And a court of equity may, therefore, prevent by injunction the enforcement of the judgment in the garnishee proceedings.<sup>47</sup>

§ 264. **Voluntary assignment; sale of debtor's real estate not enjoined.** Under a statute regulating the subject of voluntary assignments for the benefit of creditors, and which requires the recording of the assignment in order to vest the title to the property in the assignee, a sale of the debtor's real estate under judgments which are a lien thereon, and which are recovered after the execution of the assignment, but before it is recorded, will not be enjoined.<sup>48</sup>

§ 264 *a*. **Sale under execution from foreign court.** Inasmuch as the process of a court can have no extra-territorial

<sup>45</sup> *Augustin v. Dours*, 26 La. An., 261. warrant an injunction to restrain the enforcement of a judgment

<sup>46</sup> *Martin v. Jewell*, 37 Md., 530. against a garnishee, *Freeman v.*

<sup>47</sup> *Gunn v. Thornton*, 49 Ga., 380. *Miller*, 53 Tex., 372.

And see, as to facts which will <sup>48</sup> *New v. Reissner*, 56 Ind., 118.

effect, where an execution is issued from a court beyond the jurisdiction where it is sought to be enforced and has been levied, by an officer of the court in which the judgment was rendered, upon real estate of the judgment debtor located beyond the jurisdiction of that court, the act of the officer is void and the sale of the land under such execution will be enjoined.<sup>49</sup>

<sup>49</sup> *Needles v. Frost*, 2 Okla., 19, 35 Pac., 574.

## X. COURT IN WHICH THE JUDGMENT WAS RENDERED.

- § 265. Cases of concurrent jurisdiction; of inferior and superior courts.
266. Non-interference between state and federal courts.
267. State court may enjoin interference with judgment of federal court.
268. Federal courts decline to enjoin judgments of state courts.
- 268a. Exception to rule.
269. When enforcement of judgment of another state enjoined.
270. Decree in equity, doctrine as to enjoining.
271. Injunction has no extra-territorial effect.
272. Injunction not allowed against proceedings in attachment for contempt, nor against *mandamus* proceedings.

§ 265. **Cases of concurrent jurisdiction; of inferior and superior courts.** Questions of importance frequently arise touching the relative jurisdiction and powers of the court in which the judgment is obtained and of that in which it is sought to be enjoined. In so far as courts of law and equity have concurrent jurisdiction over the same matters, a party seeking relief may make his election in which tribunal he will bring his action.<sup>1</sup> And, in this country, where law and equity are usually administered by the same court, as a general rule one court will not interfere with or enjoin the judgment or process of another court of concurrent jurisdiction which is competent to grant the necessary relief; since the proceedings should, in such cases, be instituted in the court which renders the judgment or decree and which has control over its execution, when that court has power to grant the desired relief.<sup>2</sup> Nor, in such case, does the circumstance

<sup>1</sup> Conway v. Ellison, 14 Ark., 360. Stein v. Benedict, 83 Wis., 603, 53

<sup>2</sup> Platto v. Deuster, 22 Wis., 482; N. W., 891; Grant v. Quick, 5 Ender v. Lennon, 46 Wis., 299, Sandf., 612; Anthony v. Dunlap, 8 50 N. W., 194; Orient Insurance Cal., 26; Rickett v. Johnson, Ib., Co. v. Sloan, 70 Wis., 611, 36 N. 35; Chipman v. Hibbard, Ib., 268; W., 388; Cardinal v. Eau Claire, Gorham v. Toomey, 9 Cal., 77; Uhl- L. Co., 75 Wis., 404, 44 N. W., 761; felder v. Levy, Ib., 607; Crowley

that the judge of the court in which the judgment which it is sought to enjoin was rendered is disqualified to sit in the case constitute an exception to the rule, and the injunction should still be sought in the court in which the judgment was rendered, and the case should proceed as any other case in which the judge is disqualified to sit.<sup>3</sup> So an inferior court will not, in general, enjoin the proceedings of its superior court, since this would be to make the inferior paramount to the superior tribunal.<sup>4</sup> If, however, the mandate or order of the superior court has been improperly or surreptitiously obtained, its enforcement may be enjoined by an inferior tribunal whenever the judgment or decrees of an inferior court would be enjoined upon similar grounds.<sup>5</sup> And a court of equity, though not a court of last resort, may restrain the execution of a decree of such court where it satisfactorily appears that the decree has been satisfied, and where, notwithstanding such satisfaction, the person in whose favor the decree was obtained is proceeding to enforce it by execution.<sup>6</sup>

§ 266. **Non-interference between state and federal courts.**

The principles which govern courts of equity powers, either

*v. Davis*, 37 Cal. 268; *Flaherty v. Kelly* 51 Cal. 145; *Judson v. Porter*, *Ib.*, 562; *Grant v. Moore*, 88 N. C., 77; *Scott v. Runner*, 146 Ind., 12, 44 N. E., 755, 58 Am. St. Rep., 345; *Beck v. Fransham*, 21 Mont., 117, 53 Pac., 96. See also *Mason v. Chambers*, 4 J. J. Marsh., 402.

<sup>3</sup> *Flaherty v. Kelly*, 51 Cal., 145.

<sup>4</sup> *Roshell v. Maxwell*, Hemp., 25; *McCrimmin v. Cooper*, 37 Tex., 423.

<sup>5</sup> *Bank of Kentucky v. Hancock*, 6 Dana, 284.

<sup>6</sup> *McClellan v. Crook*, 4 Md. Ch., 398. Under the provisions of the Code of Iowa, when proceedings in a civil action or upon a judgment or final order are sought to be en-

joined, the suit for the injunction must be brought in the county and court in which such action is pending, or in which the judgment or order was obtained. *Anderson v. Hall*, 48 Iowa, 346. And it is held in Kentucky that the section of the Code which provides that, "no injunction shall be granted to stay proceedings on a judgment or final order of a court in any other court than that in which the judgment or order was entered or made," applies as well to justice courts as to courts of record, and that a justice's judgment must be enjoined in the justice court, although by reason of costs and accrued interest the amount involved exceeds

of the various states or of the United States, in granting relief by injunction as against proceedings pending in the courts of the other sovereignty, state or national, have already been considered somewhat in detail in a previous chapter of this treatise.<sup>7</sup> Substantially the same principles are applicable to cases where it is sought in the one tribunal, state or national, to enjoin proceedings under final judgments of the other, as were there shown to govern in cases where the relief is sought to restrain proceedings in an action at law before it has reached the stage of a final judgment, and it is neither necessary nor desirable to repeat the general discussion pertaining to that branch of the subject. As a general rule the state courts refuse to trespass upon the clearly established jurisdiction of the United States courts, and refuse to grant injunctions against the enforcement of judgments recovered in those courts, preferring that whatever grounds of equitable relief may exist against such judgments should be urged in the United States courts themselves.<sup>8</sup> Especially will the state courts refuse to interfere in cases where jurisdiction is expressly conferred by statute upon the federal courts, as in the case of a judgment for an infringement of letters patent.<sup>9</sup> And as between the state and federal courts in cases in which their jurisdiction is co-ordinate over the same subject-matter, that court which first obtains jurisdiction will be left to retain it to the end, and its process will not be interfered with by injunction from the other tribunal. A state court will not, therefore, under such circumstances, enjoin a levy under execution from a court of the United States upon property

the limit of the justice's jurisdiction. *Davis v. Davis*, 10 Bush, 274.

<sup>7</sup> See chapter II, *ante*, § 108 *et seq.*

<sup>8</sup> *McKim v. Voorhies*, 7 Cranch, 279; *Kendall v. Winsor*, 6 R. I., 453; *English v. Miller*, 2 Rich. Eq., 320; *Logan v. Lucas*, 59 Ill., 237;

*Brooks v. Montgomery*, 23 La. An., 450; *Chapin v. James*, 11 R. I., 86;

*Prugh v. Portsmouth Savings Bank*, 48 Neb., 414, 67 N. W., 309. 58 Am. St. Rep., 700; *McCullough v. Hicks*, 63 S. C., 542, 41 S. E., 761.

<sup>9</sup> *Kendall v. Winsor*, 6 R. I., 453.



claimed by a person other than the judgment debtor, but will leave the party aggrieved to seek his remedy in the forum in which the judgment was recovered.<sup>10</sup> Nor will a court of equity powers of a state enjoin proceedings under a judgment recovered in a state court, upon the application and for the protection of a creditor who afterwards proceeds by garnishment against the same debtor in a court of the United States. In such a case the relief is refused upon the ground that, the state court having first acquired jurisdiction, its right to proceed to judgment and execution can not be affected by subsequent proceedings instituted in the federal court.<sup>11</sup> And upon the principle that a court of equity, in enjoining legal proceedings, either before or after judgment, acts strictly *in personam* and not against the court or its process, an injunction will not be granted by a state court to restrain a *mandamus* suit instituted in the federal court for the purpose of compelling the county authorities to levy and collect a tax for the payment of a judgment rendered against the county in such federal court, since the *mandamus* proceeding is ancillary to the judgment and is regarded as the process of the court by means of which the judgment is enforced.<sup>12</sup>

§ 267. **State court may enjoin interference with judgment of federal court.** While, as is thus shown, the state courts decline to interfere by injunction with proceedings under judgments of the federal courts in matters over which they have acquired jurisdiction, and while they also refuse to restrain proceedings for the enforcement of a judgment of a state court in aid of a proceeding afterward instituted in a federal court, they are equally prompt to protect the jurisdiction of the federal court when it has first attached, even, if need be, by the process of injunction. And where property is levied upon under an execution upon the judgment of a

<sup>10</sup> Chapin v. James, 11 R. I., 86;  
Brooks v. Montgomery, 23 La. An.,  
450.

<sup>11</sup> Arthur v. Batte, 42 Tex., 159.  
<sup>12</sup> McCullough v. Hicks, 63 S. C.,  
542, 41 S. E., 761.

federal court, and a subsequent levy is made upon the same property under junior judgments recovered in a state court, and the premises are advertised for sale upon the same day under both levies, a state court may properly enjoin a sale under the levy from the state court, the property being previously in the hands of the United States marshal under the process from the federal court.<sup>13</sup>

§ 268. **Federal courts decline to enjoin judgments of state courts.** The same principle of comity illustrated by the preceding section is recognized by the federal courts, and they decline to interfere by injunction with proceedings under a judgment recovered in the state courts in matters over which their jurisdiction has first attached. Where, therefore, a sheriff is in possession of property levied upon under an execution from a state court which first obtained jurisdiction of the controversy, the federal courts are bound to respect such prior jurisdiction, and will decline to interfere therewith by injunction.<sup>14</sup> Indeed, under the provisions of the act of Congress prohibiting the courts of the United States from granting injunctions to stay proceedings in any court of a state, except in cases where such interference may be authorized under bankruptcy laws, it is difficult to conceive of any other case where the federal courts may properly interfere by injunction with proceedings under judgments recovered in the state courts.<sup>15</sup> Notwithstanding this absolute prohibition, however, against interference on the part of the courts of the United States, it was formerly held that a federal court might enjoin the enforcement of an execution issued by a state court which had been levied upon property belonging to a third person not a party to the judgment. Such unauthorized levy, it was held, was in no sense a proceeding of the court from

<sup>13</sup> *Hall v. Boyd*, 52 Ga., 456.

<sup>14</sup> *Ruggles v. Simonton*, 3 Bissell, 325.

<sup>15</sup> Revised Statutes U. S., § 720; 1 U. S. Comp. Stat. 1901, p. 581; *Laethe v. Thomas*, 38 C. C. A., 75.

97 Fed., 136. The legislation prior to the revision may be found in an act of Congress approved March 2, 1793, chap. xxii, sec. 5, 1 U. S. Statutes at Large, 334, 335.

which the process issued, and did not, therefore, fall within the prohibition of the act of Congress.<sup>16</sup> And although the state had provided by statute a remedy for such grievance by action at law in its own courts, which equity alone could have afforded before the statute, the courts of the United States, it was held, would not thereby be deprived of their jurisdiction to afford relief in such a case.<sup>17</sup> The later and, unquestionably, the better doctrine, however, of the federal courts is that they will not interfere by injunction to prevent a sale of one's property under execution against a third person, issued from a state court, but will leave the party complaining to seek his remedy in the state forum.<sup>18</sup> But a federal court may enjoin the enforcement of a judgment rendered by a state court when it acts for the purpose of protecting its own prior acquired jurisdiction which would otherwise be defeated or impaired.<sup>19</sup> As regards the jurisdiction of the federal courts to restrain proceedings under their own judgments, the fact that the process of the court in the injunction suit is served on defendant without the district in which the court is located does not oust it of jurisdiction and affords no ground for withholding the injunction.<sup>20</sup>

§ 268 *a*. **Exception to rule.** A well established exception to the prohibition of § 720 is recognized in cases where a judgment has been procured in a state court through the fraud of the judgment creditor, or through unavoidable accident or mistake, unaccompanied by any fault or negligence upon the part of the judgment debtor. Under such circumstances, while the federal court can not require the state court to vacate or set

<sup>16</sup> *Cropper v. Coburn*, 2 Curtis, 465.

<sup>17</sup> *Id.*

<sup>18</sup> *Daly v. The Sheriff*, 1 Woods, 175; *American Association v. Hurst*, 7 C. C. A., 598, 59 Fed., 1; *Mills v. Provident L. & T. Co.*, 40 C. C. A., 394, 100 Fed., 344.

<sup>19</sup> *Julian v. Central Trust Co.*, 193 U. S., 93, 24 Sup. Ct. Rep., 399, affirming S. C., 53 C. C. A., 438, 115 Fed., 956.

<sup>20</sup> *Logan v. Patrick*, 5 Cranch, 288.

aside its judgment, it may, nevertheless, as between the parties thereto, decree that the creditor shall not enjoy the benefits of a judgment thus fraudulently obtained. In so doing, the court acts strictly *in personam* and in no way contravenes the statutory provision in question.<sup>21</sup>

§ 269. **When enforcement of judgment of another state enjoined.** Questions of much nicety and of not a little difficulty have frequently arisen in determining the extent to which the courts of one state may interfere by the process of injunction with the collection or enforcement of judgments which have been recovered in the courts of a sister state. If the judgment of the foreign state has actually been reversed in the courts of that state, the rule is well established that its attempted enforcement in another state may properly be enjoined, if the complainant who seeks relief has himself not been guilty of laches.<sup>22</sup> Thus, when a judgment record is sued upon in the courts of another state and judgment is recovered thereon, but the original judgment is afterward reversed in the former state, its enforcement in the latter state constitutes sufficient ground for relief by injunction.<sup>23</sup> And a judgment of one state, upon which suit is brought and judgment recovered in another state, becomes so merged in the latter judgment that its attempted enforcement in the former state may be restrained because of such merger.<sup>24</sup> So in an action in the nature of a bill of interpleader to determine to which of two claimants certain policies of life insurance should be paid, the court, having found one of the claimants entitled to the payment, may properly enjoin the other from enforcing

<sup>21</sup> *Marshall v. Holmes*, 141 U. S., 589, 12 Sup. Ct. Rep., 62; *McDaniel v. Traylor*, 196 U. S., 415, 25 Sup. Ct. Rep., 369; *National Surety Co. v. State Bank*, 56 C. C. A., 657, 120 Fed., 593, 61 L. R. A., 394; *Young v. Sigler*, 48 Fed., 182; *Northern Pacific R. Co. v. Kurtzman*, 82 Fed., 241.

<sup>22</sup> *McJilton v. Love*, 13 Ill., 486; *Howard v. Simmons*, 25 La. An., 668.

<sup>23</sup> *Howard v. Simmons*, 25 La. An., 668.

<sup>24</sup> *Gould v. Hayden*, 63 Ind., 443.

judgments which he has obtained upon the same policies in another state.<sup>25</sup> But the courts of one state will not relieve against a judgment recovered in another state on the ground of alleged irregularities in the proceedings in the suit in such other state, since such objections should have been urged upon the former trial at law.<sup>26</sup> Nor will a court of equity enjoin the enforcement of a judgment of a sister state upon grounds which might have been urged as a defense to the action at law in such state, and where defendant in the judgment shows no satisfactory reason why his defense was not interposed in the original action.<sup>27</sup> Nor will a defendant be enjoined from setting up in defense of the action a judgment which he has recovered against the plaintiff in another state, upon the ground that it was recovered upon false and perjured testimony, since relief should be sought against such judgment in the state in which it was rendered.<sup>28</sup> But it would seem that a bill for an injunction will lie to stay proceedings under a judgment in an action of debt brought upon the judgment of another state upon grounds which would warrant an injunction against a judgment rendered in the same state in which the injunction is sought.<sup>29</sup> So where actions at law are brought in two different states against the same defendant for the same cause of action, and a judgment is obtained in one state which defendant satisfies in full, and he is led by the fraudulent representations of plaintiff to believe that the action at law in the other state will not be prosecuted against him, and thereby makes no defense to such action, he is entitled to an injunction in the former state to restrain plaintiff at law from collecting his judgment in the latter. In such case equity acts upon the conscience of the defendant *in per-*

<sup>25</sup> *Barry v. Brune*, 71 N. Y., 262,      <sup>28</sup> *Metcalf v. Gilmore*, 59 N. H., affirming S. C., 8 Hun, 395.      417.

<sup>26</sup> *Incas v. Bank*, 2 Stew., 280.

<sup>29</sup> *Wilson v. Robertson*, 1 Over-

<sup>27</sup> *Black v. Smith*, 13 West Va., ton, 266.



*sonam*, and not upon the courts of the state in which the action is pending.<sup>30</sup>

<sup>30</sup> *Engel v. Scheuerman*, 40 Ga., 206. "This bill is not filed," say the court, Warner, J., "for the purpose of restraining the proceedings of the court of New York; the courts of this state have no jurisdiction to do that; nor would the courts of this state have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York, between citizens of that state, resident there. The question here is, whether a court of chancery, in this state, has jurisdiction to restrain the personal action of the defendant, so far as to prohibit him from enforcing the collection of the judgment obtained in the courts of New York, according to the facts of this case. There is a clear distinction as to the power and authority of a court of equity, in this state, to restrain by injunction the proceedings of a court in another state, and the power and authority of such court to restrain by injunction the personal action of a citizen of this state. In the one case, a court of equity, in this state, has no jurisdiction; in the other, it has jurisdiction to restrain by injunction the personal action of the defendant himself from enforcing an unconscientious demand in another state, whether that demand is reduced to judgment or not, upon a proper case being made. The record now before us, in our judgment, makes such a case. The defendant voluntarily came into the courts of this state in the first instance, to have

his claim adjudicated, and that claim has been adjudicated therein, paid off and discharged. We are not aware that comity between the several states of the Union requires that the courts of this state shall assume that the courts of the state of New York are any more competent to hear and decide the defendant's claim, and to do him justice, than are the courts of this state, to the jurisdiction of which he voluntarily submitted the same for adjudication in the first instance. In restraining him, by injunction, from enforcing this unconscientious demand, in the state of New York, the court acts upon his conscience *in personam* and not upon the courts of that state; the person of the defendant is within the jurisdiction of the court, the proceedings of the courts in the state of New York are not, and we do not interfere with them. The supreme court in New York, in which the judgment was obtained, has no interest in the enforcement of that judgment—the defendant has; and a court of equity, in this state, having jurisdiction of his person, will restrain him from making that interest available, when it would be against conscience and the principles of equity that he should do so. In the language of the Master of the Rolls, in *Cranstown v. Johnston*, this court will not permit the defendant to avail himself of the law of any other country, to do what would be gross injustice."

§ 270. **Decree in equity; doctrine as to enjoining.** Upon the question of the extent to which relief by injunction may be granted against proceedings under a decree in chancery, the authorities are somewhat conflicting and not wholly reconcilable. Upon principle it is difficult to perceive any satisfactory reason why the jurisdiction should not be extended to restraining the enforcement of decrees in chancery upon the same grounds and for like reasons as those which underlie the jurisdiction in restraint of the enforcement of judgments at law. A decree being the final and formal embodiment of the judicial action of a court of equity, as a judgment is that of a court of law, no higher degree of inviolability is perceived to attach to the one judicial determination than attaches to the other. In neither event is the process of injunction directed to the court itself, but only to the action of the parties litigant, and if that action is such as to justify the preventive aid of equity by an injunction in the case of a judgment at law whose enforcement is improperly sought, the necessity for like relief against a decree in chancery under like circumstances would seem to be equally imperative, and its justification equally clear. It has been held, however, that one court of equity will not interfere with or restrain the proceedings of another court of like jurisdiction and powers.<sup>31</sup> And the rule has been broadly held that equity will not enjoin its own proceedings or restrain the enforcement of its own decrees, since by so doing it would, in effect, declare that to be improper and wrong which it had previously declared to be proper and right.<sup>32</sup> Upon the other hand, there is high authority for holding a contrary doctrine, and the rule in Tennessee, at least, may be said to be well established that a court of equity may and will enjoin the execution of its own decrees in the same manner

<sup>31</sup> *Deaderick v. Smith*, 6 *Humph.*,      <sup>32</sup> *Greenlee v. McDowell*, 4 *Ired.*  
138. But see *Douglass v. Joyner*, *Eq.*, 481.

1 *Baxter*, 32.

and upon the same grounds which would justify like relief against judgments at law.<sup>33</sup> And the rule as thus announced has been followed and applied in Oregon.<sup>34</sup> And while it is undoubtedly true that one chancellor can not enjoin the decrees of another for the purpose of reviewing or reversing them in a different court from that in which they were rendered, it is nevertheless competent for one court of equity to enjoin the collection of an execution from another upon the ground that it is being illegally enforced, having already been paid or satisfied.<sup>35</sup> So upon a bill of review to procure the reversal of a decree in equity, good cause being shown for reversing such decree, it is proper to grant an injunction *pendente lite*, to prevent a levy and sale under the decree which it is sought to reverse upon the bill of review.<sup>36</sup> And judgments recovered at law upon notes given for the purchase money of estates, sold under a decree in chancery, may be enjoined in the court of chancery in which the original proceedings were had, good cause therefor being shown.<sup>37</sup>

§ 271. **Injunction has no extra-territorial effect.** As regards the effect of an interlocutory injunction which is obtained in one country to restrain the enforcement of a judgment there recovered, it is to be observed that it is not necessarily binding or conclusive upon the courts of another country when proceedings are afterward instituted there for the enforcement of the same judgment. Thus, it is held in England, that an interlocutory order of the Irish Court of Chan-

<sup>33</sup> *Montgomery v. Whitworth*, 1 94 Va., 760, 27 S. E., 588, 64 Am. Tenn. Ch., 174. In Virginia it St. Rep., 777.

would seem that a court of equity <sup>34</sup> *McDonald v. Mackenzie*, 24 Ore., 573, 14 Pac., 866.

may enjoin the enforcement of a <sup>35</sup> *Greenfield v. Hutton*, 1 Baxter, 216.

decree *pro confesso* based upon a <sup>36</sup> *Bennett v. Brown*, 56 Ga., 216.

false return of service of process, <sup>37</sup> *Deaderick v. Smith*, 6 Humph., 138.

when such return was procured at  
the instigation of the complainant  
in the suit in which the decree  
was entered. *Preston v. Kindrick*,

cery, by which the enforcement of a judgment recovered in Ireland is enjoined, will be considered only as authority in England, and not as necessarily conclusive or binding upon the English Court of Chancery.<sup>38</sup>

§ 272. **Injunction not allowed against proceedings in attachment for contempt, nor against mandamus proceedings.** It is a well settled principle of equity jurisprudence that an injunction will never be granted for the purpose of restraining proceedings of a criminal or *quasi* criminal nature in a court having jurisdiction over such matters. A court of equity will not, therefore, enjoin a clerk of a court from issuing an attachment for the commitment of a person who has been adjudged guilty of a contempt of court in disobeying a peremptory writ of *mandamus*.<sup>39</sup> And an additional ground for refusing relief by injunction in such case is found in the fact that the granting of the writ against the officer of another court would necessarily lead to a conflict of jurisdiction, since it would be the duty of such other court to protect its own officer.<sup>40</sup> So where one has been committed and fined for a contempt of a court having competent jurisdiction and full power to inflict such punishment, a court of equity will not enjoin the execution of the order of attachment, when complainant admits that he had an opportunity of making his defense in the court by which he was attached.<sup>41</sup> And it was early held by the English Court of Chancery that an injunction would not lie to stay proceedings in *mandamus*.<sup>42</sup>

<sup>38</sup> Ball v. Storie, 1 Sim. & Stu., 211.

<sup>39</sup> Tyler v. Hamersley, 44 Conn., 419.

<sup>40</sup> Tyler v. Hamersley, 44 Conn., 419. And see Holderstaffe v. Saunders, 6 Mod., 16, where Lord Holt, Chief Justice of the Queen's Bench, is reported to have said: "Surely chancery will not grant an Injunction in a criminal matter

under examination in this court; and that if they did, this court would break it, and protect any that would proceed in contempt of it."

<sup>41</sup> Sanders v. Metcalf, 1 Tenn. Ch., 419.

<sup>42</sup> Montague v. Dudman, 2 Ves. Sr., 396. The bill was filed to procure an injunction against proceedings in *mandamus*. Upon de-

murrer to the bill Lord Hardwicke held, p. 396: "This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*; nor to an indictment; nor to any information; nor to a writ of prohibition that I know of. The reason is that the *mandamus* is not a writ remedial, but mandatory. It is vested in the King's superior court of common law to compel inferior courts to do something relative to the public. That court has a great latitude and discretion in cases of that kind; can judge of all the circumstances; and is not bound by such strict rules as in cases of private rights. That, therefore, must be given up as any color for such an injunction."



## XI. INJUNCTIONS AGAINST AWARDS.

§ 273. Judgment on award rarely enjoined.

274. The doctrine illustrated.

275. Laches will bar relief against judgment on award.

276. Injunction allowed when award based on false testimony.

§ 273. **Judgment on award rarely enjoined.** An injunction will rarely be allowed against the enforcement of a judgment made upon an award of arbitrators, since objections to the regularity of the proceedings can and usually should be made at law. And in the absence of any allegation of fraud, accident, or mistake, the relief will be withheld.<sup>1</sup> Even where it is alleged that the award was obtained by fraud and corruption, an injunction will not be allowed where the grounds relied upon could have been urged as a defense to the suit at law brought upon the award.<sup>2</sup> Where, however, the fraudulent and improper conduct of the arbitrators can only be made to appear by evidence *dehors* the award, and which can not be pleaded to the action at law, the rule is otherwise. And where, after the hearing before the arbitrators was closed, they received statements from one of the parties, unknown to the other, and containing different items relative to his claim, an injunction was granted.<sup>3</sup>

§ 274. **The doctrine illustrated.** Allegations that arbitrators exceeded the scope of their authority, and that complainant had not sufficient notice of the time and place of their meeting, will not warrant an injunction against the judgment when such facts might have been urged in defense of the action at law upon the award.<sup>4</sup> And where the invalidity relied upon as the foundation for the relief appears on the face of the proceedings, no injunction will be allowed.<sup>5</sup> So equity

<sup>1</sup> Jones v. Frosh, 6 Tex., 202;  
Emerson v. Udall, 13 Vt., 477.

<sup>2</sup> Snediker v. Pearson, 2 Barb.  
Ch. R., 107.

<sup>3</sup> Sisk v. Garey, 27 Md., 401.

<sup>4</sup> Emerson v. Udall, 13 Vt., 477.

<sup>5</sup> Meloy v. Dougherty, 16 Wis.,  
269.

will not disturb by injunction an award in favor of a private citizen against a town, when it does not appear that any great or irreparable injury is done the town, and when the person in whose favor the award was made would be subjected to great hardship and injustice should the injunction be granted.<sup>6</sup>

§ 275. **Laches will bar relief against judgment on award.** One who seeks relief in equity against an award must show due diligence in making his application and must come into court with clean hands. And when complainant has been guilty of laches in the assertion of his right, or when his own conduct has not been free from blame, he will be refused relief.<sup>7</sup> Nor will a judgment upon an award be enjoined because of an alleged mistake or misapprehension upon the part of complainant or his attorney as to the matters considered by the arbitrators, when it appears that such misapprehension was not caused by any misrepresentation or fraud of the opposing party, and when there is no evidence of fraud in obtaining the judgment.<sup>8</sup>

§ 276. **Injunction allowed when award based on false testimony.** It is thus apparent that courts of equity interfere with great reluctance with the awards of arbitrators, or with judgments rendered upon such awards, such reluctance being attributable to the fact that the law favors an adjustment of controversies by arbitration, and the courts will not, in such cases, interfere in behalf of one whose defeat is attributable to his own negligence. Where, however, an award has been obtained upon false testimony, misleading and deceiving the arbitrators, sufficient ground is presented for enjoining proceedings for the enforcement of the award, such a case being plainly distinguishable from those already discussed in which the relief has been refused.<sup>9</sup>

<sup>6</sup> *Hine v. Stephens*, 33 Conn., 497.

<sup>8</sup> *Gibson's Adm'r v. Armstrong*,

<sup>7</sup> *Jones v. Bennett*, 1 Bro. P. C., 32 Ark., 438.

528; *Smith v. Whitmore*, 1 H. & M., 576.

<sup>9</sup> *Craft v. Thompson*, 51 N. H., 536.

## XII. JUDGMENTS BY DEFAULT AND CONFESSION.

§ 277. Judgment by default rarely enjoined.

278. Question dependent upon diligence in defending; illustrations.

279. Judgments by confession rarely enjoined; illustrations.

280. Judgments fraudulently confessed may be enjoined.

281. Judgment on note barred by statute of limitations in state where given.

§ 277. **Judgment by default rarely enjoined.** In the absence of fraud or deception an injunction will rarely be allowed against a judgment which complainant has suffered to go against him by default.<sup>1</sup> And where one has negligently permitted judgment to go against him by default, such negligence is sufficient to prevent him from obtaining the aid of an injunction against the judgment.<sup>2</sup> Indeed, in a case of default, a court of equity may refuse to consider the merits of the case any further than the question of complainant's negligence in asserting his rights at law, and no sufficient excuse appearing for his having neglected to defend at law, the injunction will be refused.<sup>3</sup> Nor will the proceedings be enjoined merely because plaintiff obtained more relief than he was entitled to by his action, there being no misrepresentation or deception by which defendants were in any way misled.<sup>4</sup> And in the absence of fraud or collusion, an injunction will not be continued against a judgment at law by default where no real defense could have been made to the action, either at law or in equity.<sup>5</sup> And a court of equity will not ordinarily enjoin the enforcement of a judgment taken by default because of a defense of which the defendant might have availed him-

<sup>1</sup> *Murdock v. De Vries*, 37 Cal., 527; *Sohier v. Merrill*, 3 Woodb. & M., 179.

<sup>2</sup> *Faulkner v. Campbell, Morris* (Iowa), 148; *Mason v. Richards*, 3 Gilm., 25.

<sup>3</sup> *Faulkner v. Campbell, Morris* (Iowa), 148.

<sup>4</sup> *Murdock v. De Vries*, 37 Cal., 527.

<sup>5</sup> *Sohier v. Merrill*, 3 Woodb. & M., 179.

self in the action at law.<sup>6</sup> So when a judgment has been recovered against a married woman in a case where her coverture would have been a good defense to the action, the judgment being only voidable and not void, it will not be restrained at the suit of the wife, no fraud being shown.<sup>7</sup> So equity will not enjoin a judgment rendered by default where the complainant has a remedy, by motion in the court where the judgment was rendered, to set it aside.<sup>8</sup> Nor will relief be granted against a default judgment upon the ground of a set-off where it could have been urged as a defense to the suit in which the judgment was given.<sup>9</sup>

§ 278. **Question dependent upon diligence in defending; illustrations.** It is thus apparent that the question of granting relief by injunction against judgments which have been rendered by default is largely dependent upon the question whether the judgment debtor seeking the relief has or has not used due diligence in availing himself of his means of defense to the action at law. And if the default is not occasioned by any omission or want of diligence upon his own part, upon showing a meritorious defense to the action, he is entitled to the aid of an injunction. Thus, where complainant shows by his bill a meritorious defense to the action at law; that he was never served with process in that action and never appeared therein or authorized any one to appear for him; that the return of service of process is untrue, and that he had no knowledge or notice of the action, a judgment against him by default should be enjoined.<sup>10</sup> So where a defendant in an ejectment suit, relying upon plaintiff's assur-

<sup>6</sup> *Protheroe v. Forman*, 2 Swanst., Pac., 885; *Brown v. Chapman*, 90 227; *Langley v. Ashe*, 38 Neb., 53, Va., 174, 17 S. E., 855.  
56 N. W., 720.

<sup>9</sup> *Twigg v. Hopkins*, 85 Md., 301,

<sup>7</sup> *McCurdy v. Baughman*, 43 37 Atl., 24.  
Ohio St., 78, 1 N. E., 93.

<sup>10</sup> *Weaver v. Poyer*, 70 Ill., 567.

<sup>8</sup> *Kitzman v. Minn. T. Mfg. Co.*, See also *Owens v. Ranstead*, 22 10 N. Dak., 26, 84 N. W., 585; Ill., 161.

*Crist v. Cosby*, 11 Okla., 635, 69

ance that he will take no personal judgment against him, fails to enter his appearance, a personal judgment afterwards entered by default contrary to the agreement will be enjoined.<sup>11</sup> Upon the other hand, if it is apparent that the judgment by default was the result of negligence and inattention upon the part of defendant in the action, after due service of process upon him, he will be denied relief by injunction in conformity with the elementary principles which have been fully discussed in the preceding pages. For example, when a prior suit against defendant has been dismissed, and a subsequent suit begun against him for the same cause of action, in which he is duly served with process and judgment is had against him by default, it is not sufficient ground for enjoining the judgment to allege that he had no notice of the dismissal of the former suit and believed it to be still pending, or that counsel had been employed to defend that suit, and that he did not know the nature of the summons and complaint served on him in the second suit.<sup>12</sup> And it has been held that relief will be denied against a default judgment where the complainant fails to allege and prove that the judgment was in nowise attributable to his own fault.<sup>13</sup> And where it is sought to enjoin such a judgment, much clearer and stronger proof of diligence and freedom from fault is required than upon a motion for a new trial in the court where the judgment was rendered.<sup>14</sup>

§ 279. **Judgments by confession rarely enjoined; illustrations.** With regard to judgments by confession, as in the case of judgments by default, a court of equity will not ordinarily interfere in the absence of fraud or collusion. And where defendant has voluntarily and freely confessed judgment, without fraud or deception by the opposite party, he is

<sup>11</sup> *Brake v. Payne*, 137 Ind., 479, 37 N. E., 140.

<sup>14</sup> *Village of Celina v. Eastport Savings Bank*, 15 C. C. A., 495, 68

<sup>12</sup> *Bibb v. Hitchcock*, 49 Ala., 468. Fed., 401.

<sup>13</sup> *Meinert v. Harder*, 39 Ore., 609, 65 Pac., 1056.



thereby estopped from enjoining the proceedings on the ground of an equity existing anterior to his confession of judgment.<sup>15</sup> So where a judgment debtor obtains an injunction against a judgment confessed by him, upon the ground that he had given a note to the creditor in novation of the judgment, but it is shown upon the hearing that such note was given before the judgment was confessed, and was tendered back before execution issued, the injunction should be dissolved.<sup>16</sup> And a debtor who has confessed judgment in favor of his creditor for a smaller amount than that claimed, the confession being made by way of compromise, can not enjoin the enforcement of the judgment, in the absence of fraud by the adverse party, and when it is not shown that he was prevented from defending by reason of accident, mistake, or surprise as to material facts necessary for his defense.<sup>17</sup> So a debtor who has confessed judgment for a just indebtedness can not restrain its enforcement upon the ground that the cause of action was barred by the statute of limitations, no fraud having been practised upon him by the judgment creditor.<sup>18</sup> Nor will a judgment entered by consent of defendant's attorneys, upon sufficient authority from defendant, be enjoined when no defense is shown to the cause of action.<sup>19</sup> Nor will a judgment by confession against a corporation be enjoined upon the ground that the particular corporate officer had no power to execute the warrant of attorney, where there is no showing that the judgment is inequitable or unjust and that it is not based upon an actual indebtedness due the plaintiff.<sup>20</sup> So it is held that a judgment confessed upon a warrant of attorney

<sup>15</sup> *Moore v. Barclay*, 23 Ala., 739.  
See also *Schroeder v. Fromme*, 31 Tex., 602. And see as to the right to enjoin a judgment by confession on the ground of usury, *Hill v. Reifsnider*, 46 Md., 555.

<sup>17</sup> *Morehead v. De Ford*, 6 West Va., 316.

<sup>18</sup> *Harner v. Price*, 17 West Va., 523.

<sup>19</sup> *King v. Watts*, 23 La. An., 563.

<sup>20</sup> *Burch v. West*, 134 Ill., 258, 25 N. E., 658.

<sup>16</sup> *Sallis v. McLearn*, 23 La. An., 192.

to secure a contingent liability, not being void as between the parties, its execution will not be restrained because of a defect in the verification of the pleadings.<sup>21</sup> And when the common council of a city, acting in good faith, have directed the confession of a judgment in a suit against the city upon a demand the larger portion of which is justly due, an injunction will not be allowed in behalf of a taxpayer of the city to restrain the collection of the judgment. Even if equity has jurisdiction to restrain the action of a municipal corporation in such a case, a clear and substantial injury to the public interest must be shown before the injunction will be allowed.<sup>22</sup>

§ 280. **Judgments fraudulently confessed may be enjoined.** Notwithstanding the disinclination which is thus shown by the courts toward interfering by injunction with judgments entered by confession, the rule is well established that a judgment confessed through fraud or collusion may be enjoined in equity, under its ancient and well defined jurisdiction upon the ground of fraud.<sup>23</sup> Thus, where some of the trustees of an incorporated religious society have, without authority, executed a fraudulent judgment note in the corporate name, by collusion with the payee, for the evident purpose of encumbering the church property and subjecting it to a sale, and thereby divesting the title of the corporation, equity may enjoin the enforcement of the judgment entered by confession upon the note, the payees in the note being constructively, if not actively, parties to the fraud.<sup>24</sup> And where an injunction was granted to restrain a sale of real estate under execution, upon a bill charging defendant with having confessed the judgment collusively in order to prevent complainant from realizing his prior judgment out of the real estate, the bill was held good upon demurrer.<sup>25</sup> But a creditor who obtains an

<sup>21</sup> *Reiley v. Johnston*, 22 Wis., Young, 2 Halst. Ch., 453.  
279.

<sup>24</sup> *United Brethren Church v.*

<sup>22</sup> *Chaffee v. Granger*, 6 Mich., 51. *Van Dusen*, 37 Wis., 54.

<sup>23</sup> *United Brethren Church v.* <sup>25</sup> *Oakley v. Young*, 2 Halst. Ch.,  
*Van Dusen*, 37 Wis., 54; *Oakley v.* 453.

injunction upon the ground of fraud against a judgment confessed by his debtor, and who then proceeds with an action at law against the debtor, obtains judgment and issues execution, will be put to his election whether to stay execution during the continuance of the injunction, or to consent to a dissolution. And if he refuses so to elect, the court will dissolve the injunction, since the effect of continuing it under such circumstances would be to give such creditor an advantage over rival creditors, whom he has in the meantime delayed by his injunction.<sup>26</sup>

§ 281. **Judgment on note barred by statute of limitations in state where given.** In Wisconsin, it is held to be within the power of a court of equity, in an action upon a judgment recovered by confession upon a cognovit in another state, to re-examine the cause upon its merits, and to perpetually enjoin the plaintiff from the collection of his entire demand, if found to be not legally due. And when a judgment note, with the usual warrant of attorney to confess judgment, was given in Wisconsin, all parties to the transaction residing there, and after the note was barred by the statute of limitations in Wisconsin it was sent to Illinois and judgment was entered thereon by confession, and suit was then brought on a transcript of the judgment in Wisconsin, a perpetual injunction was granted against the collection or enforcement of the judgment.<sup>27</sup>

<sup>26</sup> *Livingston v. Kane*, 3 Johns. Ch., 224.

<sup>27</sup> *Brown v. Parker*, 28 Wis., 21. The opinion of the court is based upon the presumption that the court of Illinois, if its attention had been called to the Wisconsin statute of limitations, would have

set aside the judgment or granted a stay of proceedings; and also upon the fact that they construe the Wisconsin statute of limitations as not merely affecting the remedy, but as absolutely extinguishing the right of action.

## CHAPTER IV.

### OF INJUNCTIONS IN AID OF PROCEEDINGS IN BANKRUPTCY.

- § 282. Proceedings in state courts enjoined under bankrupt law of 1867.
- 283. Bankruptcy proceedings equitable in their nature.
- 284. Twenty-first section of the act of 1867.
- 285. Limitations upon the jurisdiction.
- 286. When injunction continued to hearing.
- 287. Judgment creditors in good faith not affected.
- 288. Sale of homestead under execution not enjoined.
- 289. Effect of creditor's knowledge of debtor's insolvency.
- 290. When injunction against judgment refused; when allowed in behalf of assignee.
- 291. Rights of assignee of bankrupt as against fraudulent assignment.
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- 292a. Jurisdiction under act of 1898.
- 293. Contempt of bankrupt court.
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- 295. Injunction against sale of vessel.
- 296. Property acquired by bankrupt after adjudication; effect of discharge; failure to plead discharge.
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- 298. Sale by United States marshal of property of third person not protected.
- 299. Suits against bankrupt pending composition, when enjoined.
- 300. State court will not enjoin person from taking benefit of bankrupt law.
- 301. Effect of false verification of petition for injunction.
- 302. Pleadings informal; notice of motion for injunction.
- 303. When injunction dissolved by final discharge.
- 303a. No injunction during suspension of law.

§ 282. Proceedings in state courts enjoined under bankrupt law of 1867. The jurisdiction of the United States courts sitting in bankruptcy to restrain proceedings in the state courts against the estate of a bankrupt, as exercised under the general bankrupt act of 1867, while that act was

in force, though sometimes questioned, may be regarded as having been too clearly settled to admit of doubt.<sup>1</sup> In such cases the United States courts exercised no supervisory jurisdiction over proceedings in the state courts since the state court itself could not be enjoined, but the litigant in that tribunal might be restrained from doing what would frustrate or impede the jurisdiction expressly conferred by the bankrupt act.<sup>2</sup> It is to be observed, however, that the juris-

<sup>1</sup> *Irving v. Hughes*, 2 Bank. Reg., 20; *In re Wallace*, *Ib.*, 52; *In re Metcalf*, Bank. Reg. Sup., xliii; *In re Reed*, *Ib.*, i; *In re Metzler*, *Ib.*, ix; *In re Richardson*, 2 Bank. Reg., 74; *Samson v. Burton*, 4 Bank. Reg., 1; *Same v. Same*, 5 Bank. Reg., 459; *In re Bowie*, 1 Bank. Reg., 185; *Sedgwick v. Menck*, *Ib.*, 108; *In re Ulrich*, 8 Bank. Reg., 15; *Walker v. Seigel*, 12 Bank. Reg., 394; *In re Whipple*, 13 Bank. Reg., 373; *Hewett v. Norton*, 13 Bank. Reg., 276; *In re Mallory*, 1 Sawy., 88. For cases where the bankrupt courts have refused to exercise the jurisdiction, see *In re Cooper*, 16 Bank. Reg., 178; *Augustine v. McFarland*, 13 Bank. Reg., 7.

<sup>2</sup> *Irving v. Hughes*, 2 Bank. Reg., 20. But in *Campbell's Case*, 1 Abb. U. S. R., 185, the jurisdiction is questioned and its existence even denied, the court insisting that when the jurisdiction of the state court and the right of the plaintiff to prosecute his suit therein have once attached, that right can not be arrested or taken away by proceedings in another court. *McCandless, J.*, observes: "The fact, therefore, that an injunction issues only to the parties before the court, and not to the court itself, is no evasion

of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. It follows, therefore, that this court (U. S. District Court) has no supervisory power over the court of common pleas of Armstrong county by injunction or otherwise, unless it is conferred by the bankrupt law. But we can not discover any provision in that act which limits the jurisdiction of the state courts, or confers any power on the bankrupt court to supersede their jurisdiction, or wrest property from the custody of their officers." \* \* \* "Finding no such grant of power, either in direct terms or by necessary implication, from any of the provisions of the bankrupt law, we are not at liberty to interpolate it on any supposed grounds of policy or expediency. We shall, therefore, be compelled to dissolve this and all other injunctions in similar cases." The language of the court, however, is to be taken in connection with the fact that in the case under consideration an injunction was sought against the enforcement of judgments of unquestioned validity recovered in the state courts prior to



diction was not dependent upon or derived from the fortieth section of the general bankrupt law of 1867, which provided that the court might restrain the debtor or any other person from making any transfer or disposition of the property pending the proceedings for an adjudication, and that while this section impliedly recognized the jurisdiction, the previous enactments of other sections conferred it. The provision of the fortieth section was held applicable only to the preliminary stage of the proceedings, and in that stage it dispensed with conditions and formalities which must otherwise have been observed.<sup>3</sup>

§ 283. **Bankruptcy proceedings equitable in their nature.** Proceedings in bankruptcy under the act of 1867 were regarded as in the nature of equity proceedings, and the jurisdiction of the court in the collection and distribution of the bankrupt's estate was in its nature an equity power. And the court might enjoin proceedings against the property of the bankrupt under executions issued upon judgments recovered after the filing of the petition, it being the policy and aim of the bankrupt law to compel an equal distribution of the estate for the benefit of all the creditors.<sup>4</sup>

the passage of the bankrupt act, and not only to restrain the judgment creditors from proceeding with the enforcement of their liens, but to enjoin the state court and its executive officers. As far as applicable to such a state of facts the observations of the court may be regarded as embodying the true doctrine, but in so far as they deny the general jurisdiction of the United States courts in bankruptcy to restrain proceedings in the state courts against the estate of the bankrupt subsequent to the filing of his petition, they are opposed to the clear weight of authority. See note 1, § 282, *ante*.

<sup>3</sup> *Irving v. Hughes*, 2 Bank. Reg., 20. As to the right to an injunction under section 40 of the act of 1867, and its duration, see *In re Moses*, 6 Bank. Reg., 181; *In re Fendly*, 10 Bank. Reg., 250; *In re Holland*, 12 Bank. Reg., 403; *In re Irving*, 14 Bank. Reg., 289; *In re Skoll*, 16 Bank. Reg., 175; *In re Fuller*, 1 Sawy., 243; *In re Mallory*, 1 Sawy., 88.

<sup>4</sup> *In re Wallace*, 2 Bank. Reg., 52. "It is the duty of this court," observes Deady, J., "by means of the jurisdiction given it, to preserve and distribute the estate of the bankrupt among his creditors, as the act prescribes. The respond-

§ 284. **Twenty-first section of the act of 1867.** The twenty-first section of the general bankrupt act of 1867, providing for a stay of proceedings in all actions at law or in equity against the bankrupt pending the question of his discharge was held applicable to all cases where the personal liability of the debtor was sought to be fixed by a final judgment pending the determination as to his discharge. And the intent of the section being to prevent a race of diligence between creditors and to protect the bankrupt from being harassed with suits pending the question of his discharge, proceedings in the state courts would be enjoined until that question could be determined.<sup>5</sup> But the jurisdiction conferred by the twenty-first sec-

ents, by means of these executions, are attempting to prevent this distribution of the estate. An injunction is a proper remedy or means to prevent this wrong and fraud upon the law from being accomplished. A petition to the court is the proper means of invoking this power."

<sup>5</sup> *In re Metcalf*, Bank. Reg. Sup., xliii. Say the court, Benedict, J.; "The twenty-first section of the bankrupt act declares that 'no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined.' This is a very clear provision, the object of which is to prevent a race of diligence between creditors, and to protect the bankrupt from being harassed with suits pending the question of his discharge. It seems to apply to all cases where the personal liability of the debtor is sought to be fixed or ascertained

by a final judgment pending the determination of the question of his discharge, and, in my opinion, it applies to a case like the present, where an action against the bankrupt is pending in the Court of Appeals of the state to which an appeal has been taken by the bankrupt prior to the filing of the petition in bankruptcy. In such a case there is no final judgment within the meaning of the bankrupt act; the debtor's liability has not been finally determined; and there being no final judgment, the bankrupt act declares that the suit shall stop, pending the determination of the question of the bankrupt's discharge. This option to endeavor to obtain a discharge in bankruptcy, and, failing in that, to defend all undetermined personal actions, is a right given a debtor by the bankrupt act under the Constitution of the United States, and he is entitled to be protected in that right by this court."

tion of the bankrupt act did not extend to the enjoining of proceedings against the bankrupt in any other district than that in which the proceedings in bankruptcy were pending, and the United States district court had no power, either under the act of 1867 or independent of that statute, to restrain proceedings in the courts of the state by reason of bankrupt proceedings pending in another district and before another court.<sup>6</sup> And under section 720 of the Revised Statutes of the United States prohibiting the granting of injunctions by courts of the United States to stay proceedings in any court of a state except when authorized by any law relating to proceedings in bankruptcy, it has been held that a circuit court of the United States has no jurisdiction to restrain a levy upon the property of a bankrupt under a judgment recovered in a state court after the filing of the petition in bankruptcy.<sup>7</sup>

§ 285. **Limitations upon the jurisdiction.** While the jurisdiction of the United States courts sitting in bankruptcy to restrain proceedings against the estate of the bankrupt in the state courts is well established, these courts will not in the exercise of this their unquestioned prerogative, withdraw cases from the state courts into their own forum and there determine them, such a course being clearly beyond their power.<sup>8</sup> They may, however, enjoin creditors who have obtained an agreement with the bankrupt which is in fraud of the law and an invasion of the rights of the general creditors, from making any use of such agreement.<sup>9</sup> Nor will these courts permit the creditor to proceed with a suit in the state courts, the effect of which would be to allow him to reap the advantage of his fraudulent agreement from the use of which he has already been enjoined, and an injunction will be granted

<sup>6</sup> *In re Richardson*, 2 Bank. Reg., 74.

<sup>8</sup> *Samson v. Burton*, 4 Bank. Reg., 1.

<sup>7</sup> *Tiffit v. Iron Clad Mfg. Co.*, 16 Blatch., 48.

<sup>9</sup> *Id.*

to restrain him from proceeding with such suit, the question being peculiarly within the jurisdiction of a court of bankruptcy.<sup>10</sup>

§ 286. **When injunction continued to hearing.** Where creditors filed their petition for an adjudication of bankruptcy against their debtors, upon the ground of having made preferred assignments and of having confessed judgment with intent to give certain creditors preference over others and an injunction was allowed to restrain proceedings under the assignments and upon the judgments, such injunction would not be dissolved until the determination of the question of the debtor's bankruptcy. The intent of the fortieth section of the act being to prevent any interference with the debtor's property until a decision should be reached upon the question of bankruptcy, the injunction would be continued until such decision.<sup>11</sup>

<sup>10</sup> *Samson v. Burton*, 4 Bank. Reg., 1.

<sup>11</sup> *In re Metzler*, Bank. Reg. Sup., ix. The court, Blatchford, J., construing the fortieth section of the act of 1867, say: "The injunctions were granted under the fortieth section of the act. The intent of the provisions of that section manifestly is, to give the court authority in a case of involuntary bankruptcy, when an order is issued requesting the debtor to show cause why he should not be declared a bankrupt, to prevent by injunction any interference with the debtor's property until a decision shall be arrived at, whether the debtor is or is not to be adjudged a bankrupt. In the present case no such decision has been arrived at. The decision is suspended by the act of the debtors in denying that they have committed the act of bankruptcy alleged, and in demanding a trial

by jury. The same facts which constituted sufficient ground for issuing the order to show cause, also furnish sufficient reasons for issuing the injunction. The court will not, on a motion of this kind, on affidavits, dispose of what are really all the issues involved in the proceeding. If the injunctions should be dissolved, and the debtors should afterward be adjudged bankrupts and an assignee of their estate be appointed, the court would have dissolved the injunctions on the same state of facts on which the debtors were adjudged bankrupts. Substantially the whole of the property of the debtors would have passed to the three preferred creditors, leaving to the assignee only an inheritance of litigation; and the very object of the remedy by injunction given by the fortieth section would have been defeated."

§ 287. **Judgment creditors in good faith not affected.** It is to be observed that the bankrupt law of 1867 in no manner impaired the rights of judgment creditors whose liens upon the bankrupt's property were acquired in good faith and without fraud before the passage of the act, or before the filing of the petition. The rights of judgment creditors who, by the use of diligence and without fraud or collusion, secured their debts as a lien upon the property of the debtor prior to the filing of his petition in bankruptcy, remained intact, and the bankrupt court would not enjoin them from the enforcement of those rights.<sup>12</sup> Thus, where creditors acting in good faith obtained judgments, issued executions and levied upon the personal property of their debtor prior to the filing of his petition, and where it did not appear that the property levied upon was more than the amount of the judgments, or that a sale by the assignee would realize more than a sale by the sheriff under execution, and it not appearing that any advantage would result to the creditors by retaining an injunction against such sale, the injunction was dissolved.<sup>13</sup>

§ 288. **Sale of homestead under execution not enjoined.** A creditor who has obtained judgment and issued execution against his debtor before the filing of his petition in bankruptcy will not be restrained from selling property claimed by the bankrupt as a homestead, since if such property is in fact a homestead the title thereto is unaffected by the operation of the bankrupt act, and the bankrupt, if wrongfully deprived of his homestead, has his remedy in the state courts.<sup>14</sup>

§ 289. **Effect of creditor's knowledge of debtor's insolvency.** The question of the creditor's knowledge of his debtor's circumstances at the time of obtaining judgment is not without weight in determining whether he shall be enjoined from pursuing his judgment in the state courts. And when the

<sup>12</sup> *Campbell's Case*, 1 Abb. U. S. R., 185; *In re Wilbur*, 3 Bank. Reg., 71.

<sup>13</sup> *In re Wilbur*, 3 Bank. Reg., 71.

<sup>14</sup> *In re Hunt*, 5 Bank. Reg., 493.



creditor, at the time of obtaining judgment and execution and levying upon the property of his debtor, had sufficient cause to believe that he was insolvent and that he permitted him to obtain judgment, execution and levy with intent to give a preference within the meaning of the bankrupt act, the court will refuse to dissolve an injunction restraining such creditor from selling the property.<sup>15</sup> So where a creditor, having reasonable cause to believe his debtor to be in an insolvent condition, attached his property and after obtaining judgment against him by default seized his real estate on execution, the debtor having filed his petition in bankruptcy before the completion of the levy, the assignee was allowed to enjoin the creditor from proceeding with a sale of the estate, the attachment having been levied within four months prior to the commencement of the proceedings in bankruptcy.<sup>16</sup>

§ 290. **When injunction against judgment refused; when allowed in behalf of assignee.** Equity will not enjoin a judgment at law upon the ground that the court of law has no jurisdiction over the matter in controversy, by reason of the pendency of proceedings in bankruptcy against the judgment debtor at the commencement of that action, of which plaintiff in such action was duly notified; since if the court of law had no jurisdiction its judgment is void, and there is sufficient remedy at law for its attempted enforcement.<sup>17</sup> And an injunction has been refused in behalf of an assignee in bankruptcy seeking to restrain a judgment creditor of the bankrupt from selling his real estate under execution, the judgment having been recovered prior to the proceedings in bankruptcy.<sup>18</sup> So an assignee in bankruptcy can not maintain a bill to set aside a sale by the bankrupt, and to restrain the purchaser from prosecuting an action of trespass in a state court against attaching creditors for having seized the

<sup>15</sup> *In re Bloss*, 4 Bank. Reg., 37.

<sup>17</sup> *Hart v. Lazon*, 46 Ga., 396.

<sup>16</sup> *Haskell v. Ingalls*, 5 Bank.

<sup>18</sup> *Reeser v. Johnson*, 76 Pa. St.,

Reg., 205.

313.

goods sold, when the property has already come into the possession of the assignee and he is not a party to the proceedings in the state court.<sup>19</sup> But a state court may properly entertain a bill for an injunction in behalf of an assignee in bankruptcy in the United States court, seeking to restrain the collection of judgments against the bankrupt in fraud of the rights of his creditors, the assignee being regarded as vested with all the rights in that behalf of creditors themselves.<sup>20</sup>

§ 291. **Rights of assignee of bankrupt as against fraudulent assignment.** Since the property of the bankrupt assigned under the act of 1867 vested in the assignee for the benefit of all the creditors, it was held that he might properly enjoin all proceedings in the state courts relative to such property, which were had under an assignment in fraud of creditors.<sup>21</sup> And where a debtor had made a voluntary assignment for the benefit of his creditors, which was a fraud upon the bankrupt law and an act of bankruptcy, his assignee in bankruptcy was allowed to enjoin the assignee under such voluntary assignment from taking the property.<sup>22</sup> So an assignee in bankruptcy, upon a bill filed by him in the United States circuit court to set aside fraudulent sales and transfers of his property made by the debtor, has been allowed an injunction *pendente lite* to restrain the prosecution of suits in the state courts by persons claiming the property, such relief being regarded

<sup>19</sup> *Main v. Bromley*, 10 Biss., 199.

<sup>20</sup> *Barnard v. Davis*, 54 Ala., 565. As to the right to enjoin a judgment creditor from selling property of the bankrupt under execution, under section 40 of the act of 1867, see *In re Lady Bryan Mining Co.*, 6 Bank. Reg., 252; *In re Malory*, 1 Sawy., 88. As regards the parties who might institute the proceedings, under the act of 1867, it was held that before the appointment of an assignee in bankruptcy

a petition to enjoin proceedings in the state courts by creditors for the enforcement of their judgment liens could be brought only by the bankrupt himself; while after the appointment of assignees, they were the proper parties to apply for relief. *In re Bowie*, 1 Bank. Reg., 185.

<sup>21</sup> *Sedgwick v. Menck*, 1 Bank. Reg., 108.

<sup>22</sup> *In re Skoll*, 16 Bank. Reg., 175.

as incidental to the main object of the suit.<sup>23</sup> But in the case of a third person claiming absolute title to the matter in controversy as against the assignee in bankruptcy, the bankrupt court has refused to interfere by injunction upon a summary application in the bankrupt proceedings upon the ground that a new and independent suit was necessary to determine such conflicting questions of title.<sup>24</sup> But under the English bankrupt act of 1869, the court of bankruptcy, has jurisdiction in a summary method to restrain a person not a party to the proceedings from dealing with property alleged to have been fraudulently assigned before the bankruptcy.<sup>25</sup>

§ 292. **Receivers in state courts; effect of prior jurisdiction.** If the property and effects of a debtor have already passed into the hands of receivers appointed by a state court, which has properly acquired jurisdiction of the subject-matter and of the parties before proceedings in bankruptcy are instituted against the debtor, the bankrupt court will not interfere by injunction with the possession of the property by such receivers, nor divest such possession in behalf of the assignee in bankruptcy. And the fact that the receivers of the state court assert a prior jurisdiction acquired by that tribunal affords no ground for the interference of the bankrupt court, when it is not shown that the property is in danger of waste or loss, or that the receivers are guilty of any misconduct. Nor, indeed, has the bankrupt court any such superior jurisdiction or supervisory control over the state tribunal as to warrant it in divesting the possession of such receivers, or in enjoining them from the management of the property.<sup>26</sup> And the bankrupt court may, in

<sup>23</sup> *Kellogg v. Russell*, 11 Bank. Reg., 121; *S. C.*, 11 Blatch., 519; *Hudson v. Schwab*, 18 Bank. Reg., 480.

<sup>24</sup> *Smith v. Mason*, 14 Wal., 419. And see *Wilson v. Childs*, 8 Bank. Reg., 527; *In re Marter*, 12 Bank. Reg., 185; *In re Oregon Iron Works*, 17 Bank. Reg., 404; *S. C.*, 4 Sawy., 169.

<sup>25</sup> *Ex parte Anderson*, L. R. 5 Ch., 473.

<sup>26</sup> *Beecher v. Bininger*, 7 Blatch., 170; *In re Clark and Bininger*, 4 Benedict, 88; *In re Clark*, 3 Bank. Reg., 130. And see *Alden v. Boston*, 5 Bank. Reg., 230. But see *Platt v. Archer*, 9 Blatch., 559.

such case, enjoin the bankrupts from interfering with the property in the possession of the receivers.<sup>27</sup> If, however, the bankrupt court has first acquired possession of the debtor's property, it may enjoin the creditors from further proceedings in the state courts. Thus, where after the filing of a creditor's bill and the appointment of receivers in a state court, the debtor files his petition in bankruptcy and is adjudicated a bankrupt, and delivers possession of his assets to the officer of the bankrupt court, the receivers in the state courts having obtained possession of no assets, the creditors may be enjoined from further proceedings in their suits, reserving all questions as to the priorities which they may have obtained by their proceedings in the state courts.<sup>28</sup>

§ 292 *a*. **Jurisdiction under act of 1898.** The jurisdiction of the United States courts under the bankrupt law of 1898 and its amendments is considerably narrowed as compared with that of the earlier acts of 1841 and 1867. By the first clause of § 23 of this act, the jurisdiction of the United States circuit courts in controversies at law or in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants to the bankrupt's estate, is expressly confined to those cases and those only in which the jurisdiction would have existed had no bankruptcy proceedings been instituted and the controversy had been between the bankrupt and such adverse claimants. And the second clause of § 23 is held to limit the jurisdiction of all courts, including the United States district courts, over independent suits brought by the trustee

<sup>27</sup> *In re Clark and Bininger*, 4 petition of the assignees under  
Benedict, 88. In *Freeman v. Fort*,  
52 Ga., 371, it was held that where  
a state court, upon an ordinary  
creditor's bill, had enjoined the dis-  
position of the debtor's property  
and had taken possession of his es-  
tate through its receiver, it would  
not abandon its jurisdiction and  
surrender the assets merely upon

proceedings in bankruptcy subse-  
quently instituted, and that it  
would not surrender the assets  
until the bankrupt court had en-  
joined the creditors from proceed-  
ing in the state court. See also  
*Seligman v. Ferst*, 57 Ga., 561.

<sup>28</sup> *In re Whipple*, 13 Bank. Reg.,  
373.

concerning property of the bankrupt; such suits being limited, except with the consent of the bankrupt, to courts where the latter might himself have brought or prosecuted such suits had no bankruptcy proceedings been commenced.<sup>29</sup> But under the provision of the fifteenth clause of § 2 of act of 1898, the bankrupt court as such has jurisdiction, by summary process, to restrain actions in state courts concerning property of the bankrupt or any other disposition of or interference with the bankrupt's estate which would be void under the provisions of the law and would render its provisions nugatory.<sup>30</sup> Thus, where, after an adjudication of bankruptcy, an action of replevin has been commenced in a state court against a bankrupt to recover possession of property claimed by him at the time of the adjudication and in the possession of the referee at the time the action was commenced, the prosecution of such action will be enjoined.<sup>31</sup> So where an insolvent has made a general assignment for the benefit of his creditors under the laws of the state within four months of the filing of a petition against him, such assignment being void under the provisions of the bankrupt law, the bankrupt court may properly enjoin a sale or other disposition of the bankrupt's estate by the assignee.<sup>32</sup> So where attachment suits have been instituted in a state court which are void under the terms of the bankrupt law and would result in an illegal preference, the attaching creditors may be restrained from prosecuting their suits in the state court.<sup>33</sup> So a trustee in bankruptcy, being in possession

<sup>29</sup> 30 Stat., 552; *Bardes v. H-warden Bank*, 178 U. S., 524, 20 Sup. Ct. Rep., 1000; *Mitchell v. McClure*, 178 U. S., 539, 20 Sup. Ct. Rep., 1000; *Hicks v. Knost*, 178 U. S., 541, 20 Sup. Ct. Rep., 1006.

<sup>30</sup> *White v. Schloerb*, 178 U. S., 542, 20 Sup. Ct. Rep., 1007; *In re Gutwillig*, 34 C. C. A., 377, 92 Fed., 337; *Davis v. Bohle*, 34 C. C. A., 372, 92 Fed., 325; *Bear v. Chase*, 40

C. C. A., 182, 99 Fed., 920; *In re Chambers, Calder & Co.*, 98 Fed., 865.

<sup>31</sup> *White v. Schloerb*, 178 U. S., 542, 20 Sup. Ct. Rep., 1007.

<sup>32</sup> *In re Gutwillig*, 34 C. C. A., 377, 92 Fed., 337; *Davis v. Bohle*, 34 C. C. A., 372, 92 Fed., 325.

<sup>33</sup> *Bear v. Chase*, 40 C. C. A., 182, 99 Fed., 920.



of certain premises and there engaged in conducting the business of the bankrupt, may enjoin an action of ejectment brought against him in a state court for the recovery of the possession of such premises, the landlord, in such case, being compelled to look to the bankruptcy court for the protection of his rights.<sup>34</sup> In some cases, however, the bankruptcy court has refused to enjoin the enforcement of judgments rendered against a bankrupt in a state court prior to the institution of bankruptcy proceedings; the federal court, in such case, acting upon principles of comity and out of regard for the prior acquired jurisdiction of the state court.<sup>35</sup> And where an action in a state court concerning the property of a bankrupt has been commenced more than four months prior to the institution of bankruptcy proceedings and is there proceeding to judgment, the prosecution of such action or the enforcement of a judgment rendered therein will not be enjoined by the bankruptcy court.<sup>36</sup>

§ 293. **Contempt of bankrupt court.** A judgment creditor in a state court, being enjoined in proceedings in bankruptcy from selling the debtor's property, after an adjudication in bankruptcy, has been attached for contempt in selling in disregard of the injunction.<sup>37</sup> So a bankrupt who received money from his debtor after the filing of a petition in bankruptcy and after an injunction against him has been found guilty of contempt.<sup>38</sup>

<sup>34</sup> *In re Chambers, Calder & Co.*, 98 Fed., 865.

<sup>35</sup> *In re Seebold*, 45 C. C. A., 117, 105 Fed., 910; *In re Shoemaker*, 112 Fed., 648; *In re Wells*, 114 Fed., 222.

<sup>36</sup> *Frazier v. Southern L. & T. Co.*, 40 C. C. A., 76, 99 Fed., 707; *Pickens v. Dent*, 45 C. C. A., 522, 106 Fed., 653.

<sup>37</sup> *In re Atkinson*, 7 Bank. Reg., 143.

<sup>38</sup> *In re Hayden*, 7 Bank. Reg., 192. But it was held in this case that the bankrupt might purge himself of contempt by turning over all his assets to his assignee. As to the punishment for violating an injunction restraining attaching creditors of a bankrupt from proceeding with their attachments, see *Hyde v. Bancroft*, 8 Bank. Reg., 24.

§ 294. **When relief allowed as against mortgagees of bankrupt.** Relief by injunction has been allowed in behalf of an assignee in bankruptcy to restrain mortgagees from proceeding at law to foreclose a mortgage given by the bankrupt before the commencement of proceedings in bankruptcy, upon the ground that it was the duty of such secured creditor to bring the property into court to be distributed by the assignee.<sup>39</sup> And where a sale by mortgagees of chattels mortgaged to them by the bankrupt previous to filing his petition would injuriously affect the rights of the creditors by sacrificing the value of the property, there being a controversy concerning the right of the assignee to redeem, a temporary injunction may be allowed pending such controversy to prevent the mortgagees from selling under the power of sale.<sup>40</sup> But the bankrupt court has refused to enjoin the holder of a mortgage from proceeding with a foreclosure suit when no advantage could result to the estate of the bankrupt from such interference, the equity of redemption being of no value, and neither the assignee nor any of the creditors invoking the aid of the court.<sup>41</sup> And where an assignee in bankruptcy had voluntarily entered his appearance in a foreclosure suit, brought in a state court after the commencement of proceedings in bankruptcy, the bankrupt court refused after a sale of the property to restrain in behalf of the assignee further proceedings in the state court.<sup>42</sup>

§ 295. **Injunction against sale of vessel.** Where a vessel belonging to bankrupts has passed with their other assets into the hands of the assignee, and is afterward attached in proceedings *in rem* to recover damages incurred by a collision with another vessel prior to the adjudication of bankruptcy, the libelants will be restrained from holding the vessel or from

<sup>39</sup> *In re Snedaker*, 3 Bank. Reg., 155; *In re Nathan*, 92 Fed., 590.

<sup>40</sup> *Foster v. Ames*, 2 Bank. Reg., 146.

<sup>41</sup> *In re Iron Mountain Co.*, 9 Blatch., 320.

<sup>42</sup> *Augustine v. McFarland*, 13 Bank. Reg., 7.

interefering in any manner with the property in the hands of the assignee. The possession of the vessel by the assignee being the possession of the court, it can not lawfully be disturbed, and if libelants in the collision suit have a lien upon the vessel by reason of the collision, it must be submitted to the bankrupt court which has full power to liquidate such lien.<sup>43</sup>

§ 296. **Property acquired by bankrupt after adjudication; effect of discharge; failure to plead discharge.** As regards property acquired by the bankrupt after the adjudication and pending proceedings for a final discharge, it is held to be within the protection of the general laws of the land, of which the bankrupt law is but a part. It is, therefore, competent for the state courts to restrain the coercive sale by a creditor of the property of the bankrupt acquired after the adjudication, the execution being upon a judgment for a debt which was provable in the court of bankruptcy.<sup>44</sup> And

<sup>43</sup> *In re People's Mail Steamship Co.*, 2 Bank. Reg., 170.

<sup>44</sup> *Turner v. Gatewood*, 8 B. Mon., 613; *Leonard v. Yohnk*, 68 Wis., 587. The doctrine as laid down in *Turner v. Gatewood*, 8 B. Mon., 613, which was decided under the bankrupt act of 1841, is that while the United States courts have exclusive jurisdiction of proceedings in bankruptcy, the state courts may suspend such proceedings as are inconsistent therewith, and which are attempted to be carried on through their instrumentality, until the question of the bankrupt's discharge can be determined. "There is in such course," say the court, Marshall, C. J., "no clashing of jurisdiction. The after-acquired property of the bankrupt is not within the operation of the proceeding in bankruptcy, and cer-

tainly not within the exclusive jurisdiction of the bankrupt court, but is left to the protection of the general laws of the land, of which the bankrupt law is but a part. And when the creditor is using the process furnished by that law to subject property which by the result of a pending litigation in another forum may be determined not to be liable, there seems to be a peculiar propriety in appealing to the ordinary tribunals for protection. We are satisfied, therefore, that the circuit judges of this commonwealth, and the justices of the peace appointed for the purpose within the several counties, have power to grant injunctions to prevent, after a decree in bankruptcy assigning the bankrupt's property, and in prospect of his discharge by final decree

the effect of such injunction is to render an officer selling the property with notice thereof a trespasser *ab initio*, even though he may have levied upon the property before the granting of the writ.<sup>45</sup> So where a judgment debtor has been discharged in bankruptcy, and his sureties against whom judgment has also been recovered have paid the debt, an attempt to enforce the judgment against him may be enjoined.<sup>46</sup> But a judgment debtor can not enjoin the enforcement of an execution against him upon the ground of his discharge in bankruptcy, when he has failed to avail himself of the bankrupt proceedings in defense of the action in which the judgment was recovered.<sup>47</sup> Nor has the bankrupt court any jurisdiction to relieve against a judgment obtained against the bankrupt in a state court, in an action brought after his adjudication in bankruptcy in which he has failed to plead his discharge.<sup>48</sup>

§ 297. **Effect of discharge under state insolvent laws.** While the authorities are not altogether reconcilable as to the effect of a discharge under the insolvent laws of a state upon judgments recovered against the insolvent, the better doctrine seems to be that a debtor who has obtained his discharge may enjoin proceedings against him to recover judgments upon his former liabilities.<sup>49</sup> Thus, where subsequent to his discharge

and certificate, the coercive sale of his property acquired after the assignment under an execution for a debt which was provable in the bankrupt court." But in *McMurry v. Edgerly*, 20 Neb., 457, 30 N. W., 417, it is held that the relief should be allowed only upon condition of the bankrupt paying the judgment debt.

<sup>45</sup> *Turner v. Gatewood*, 8 B. Mon., 613.

<sup>46</sup> *Hays v. Ford*, 55 Ind., 52.

<sup>47</sup> *Gallaher v. Michel*, 26 La. An., 41; *Bowen v. Eichel*, 91 Ind., 22; *Burke v. Pinnell*, 93 Ind., 540. And see, *ante*, § 90. As to the right of

the debtor to enjoin a judgment rendered against him by default after his discharge in bankruptcy, the cause of action having been proven against his estate in bankruptcy, see *Taylor v. Fore*, 42 Tex., 256.

<sup>48</sup> *In re Ferguson*, 16 Bank. Reg., 530.

<sup>49</sup> *Starr v. Heckart*, 32 Md., 267; *Carrington v. Holabird*, 17 Conn., 530. But see, *contra*, *Katz v. Moore*, 13 Md., 566, where it is held that a judgment at law will not be enjoined because of the discharge of the judgment debtor under state insolvent laws pre-

under the state laws, proceedings by *scire facias* are instituted against the insolvent to revive a former judgment, and without fault or laches on his part he is prevented from pleading his discharge as a defense to the *scire facias*, equity will enjoin the enforcement of an execution under the judgment.<sup>50</sup>

§ 298. **Sale by United States marshal of property of third person not protected.** A United States marshal who, under a warrant in bankruptcy directing him to take possession of the bankrupt's property, seizes property held by a third person, being indemnified by the creditors for so doing, will not be allowed to restrain proceedings against him in the state courts for the alleged tort in the wrongful taking of such property. The bankrupt court will neither protect its officers in the commission of a tort, nor will it compel the party injured to submit his claim for damages to that court for adjudication.<sup>51</sup>

§ 299. **Suits against bankrupt pending composition, when enjoined.** Pending proceedings for a composition in bankruptcy, and until the expiration of the time for the debtor to make the payments required by the composition, it has been held proper for the bankrupt court to enjoin the prosecution of suits against the debtor upon demands to which the composition extended.<sup>52</sup> But after the lapse of the full time provided by the terms of the composition for carrying it into effect, the bankrupt court has refused to enjoin a creditor from prosecuting his action in a state court against the bankrupt.<sup>53</sup>

§ 300. **State court will not enjoin person from taking benefit of bankrupt law.** Since Congress is vested by the constitu-

tions to the rendering of the judgment, even though the cause of action accrued before the discharge was granted. The court reach this conclusion upon the reasoning that while the legal liability to pay the debt has ceased, the moral obligation remains as strong as before, and is sufficient to support the judgment.

<sup>50</sup> *Starr v. Heckart*, 32 Md., 267.

And see *Carrington v. Holabird*, 17 Conn., 330.

<sup>51</sup> *In re Marks*, 2 Bank. Reg., 175.

<sup>52</sup> *In re Hinsdale*, 16 Bank. Reg., 550; *In re Rodger*, 18 Bank. Reg., 381. See also *In re Shafer*, 17 Bank. Reg., 116. But see *In re Tift*, 18 Bank. Reg., 78.

<sup>53</sup> *In re Nebenzahl*, 17 Bank. Reg., 23.



tion with the power to establish a uniform system of bankruptcy throughout the United States, a state court will not interfere by injunction to restrain a person from availing himself of the benefit of the national bankrupt law.<sup>54</sup>

§ 301. **Effect of false verification of petition for injunction.** Where, upon the institution of involuntary proceedings in bankruptcy, the bankrupts were enjoined from interfering with their property, the court dissolved the injunction and dismissed the proceedings in bankruptcy upon it appearing that the verification of the petition was known to be false by the petitioning creditors when made.<sup>55</sup>

§ 302. **Pleadings informal; notice of motion for injunction.** In exercising the equity powers pertaining to a court of bankruptcy, it is not necessary that resort should be had to the formal and plenary proceedings usual in courts of equity, but a mere petition setting forth the facts and praying for the relief sought is sufficient.<sup>56</sup> So a motion to dissolve the injunction is sufficient to raise the question of its merits without resort to the formality of a demurrer.<sup>57</sup> Nor need notice of the application for the injunction be given to the adverse party unless directed by the court or judge.<sup>58</sup>

§ 303. **When injunction dissolved by final discharge.** The effect of the final discharge of the bankrupt is to dissolve *ipso facto* an injunction granted until the discharge for the purpose of restraining creditors from proceeding against the bankrupt in the state courts. It follows, therefore, that no

<sup>54</sup> *Fillingim v. Thornton*, 49 Ga., 384; S. C., 12 Bank. Reg., 92.

<sup>55</sup> *In re Keiler*, 4 Ab. New Cas., 150.

<sup>56</sup> *In re Wallace*, 2 Bank. Reg., 52.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* The restriction in the act of 1793, forbidding the issuing of injunctions without notice, was held applicable only to suits in

equity in the Supreme and circuit courts of the United States, and it did not affect the allowance of injunctions under the equity power conferred upon the district courts by the bankrupt act in relation to matters exclusively within the jurisdiction of the bankrupt court. See also *In re Muller*, 3 Bank. Reg., 86.

motion is necessary for a dissolution, the order for the discharge itself terminating the injunction, and the bankrupt must thereafter use his discharge itself as his protection in all cases affected thereby.<sup>59</sup>

§ 303 *a*. **No injunction during suspension of law.** A creditor can not have an injunction during the period of the suspension of the bankruptcy law restraining an insolvent debtor from making a fraudulent disposition of his property, in order that the creditor may, after the expiration of the suspension, commence bankruptcy proceedings against him.<sup>60</sup>

<sup>59</sup> *In re Thomas*, 3 Bank. Reg., 7.

<sup>60</sup> *Ellis v. Hays S. & L. Co.*, 65 Kan., 174, 69 Pac., 165.

## CHAPTER V.

### OF INJUNCTIONS IN ECCLESIASTICAL MATTERS.

- § 304. Religious trusts protected in equity.
- 305. Violation of such trusts as to use of property enjoined; the doctrine illustrated.
- 306. Limitation upon the rule dependent upon question of title.
- 307. Distinction between ecclesiastical and corporate character of religious body.
- 308. Equity will not revise acts of church discipline.
- 309. The same.
- 310. Decisions of ecclesiastical tribunal conclusive as to canons of church.
- 310a. Court may determine jurisdiction of tribunal.
- 311. Deposed minister enjoined from serving.
- 312. Pastor regularly chosen not enjoined.
- 313. Removal of minister not enjoined.
- 314. Injunctions against trustees and church officers.
- 315. The same, when refused.
- 316. Disturbance of burial ground enjoined.
- 317. When doctrinal questions investigated in equity.
- 318. Violation of trust by one of two religious bodies ground for injunction.
- 319. Mere trespass not enjoined.
- 319a. Injunction where question of trust involved, ejectment being inadequate.
- 320. Diversion of church property to school purposes enjoined.
- 321. Pew holders not allowed to enjoin trustees from rebuilding.
- 322. Church property in receiver's hands protected by injunction.

§ 304. **Religious trusts protected in equity.** The aid of equity is frequently invoked for the protection of religious charities, and for the enforcement of trusts created by donations of money or property for religious purposes. The jurisdiction in this class of cases rests upon the foundation of trusts, and may be regarded as ancillary to the general jurisdiction of equity over that subject. In all such charities

the courts will, if possible, give effect to the intention of the donor, provided such intention is legal, and the objects of the trust being ascertained, any perversion thereof or departure therefrom may be prevented by injunction.<sup>1</sup>

§ 305. **Violation of such trusts as to use of property enjoined; the doctrine illustrated.** In accordance with these principles, it is held that where real estate is conveyed to the

<sup>1</sup> *Kniskern v. Lutheran Churches*, 1 Sandf. Ch., 439. In laying down the principles upon which courts of equity interfere in this class of cases, Sandford, Assistant Vice Chancellor, says: "They proceed on the ground of a trust, and their aim is to ascertain its scope and objects and to enforce its proper and faithful administration. The jurisdiction is environed with greater difficulties than that over the ordinary private trusts which come under our review, by reason of the uncertainty which frequently prevails as to the precise objects and intentions of the donor. The inquiry often arises after a great lapse of time, when no living witness can inform the conscience of the court, and when its search for truth must be made in history, and in the controversial writings of contemporaries of the donor. The course of the administration of the trust, and its alleged perversion, are also frequently shrouded in mystery and involved in the subtleties of polemics and theology. Still the court is bound to exercise its control over these charitable funds, as well as over the less difficult class of private trusts. \* \* In the leading English authority, *The Attorney-General v. Pearson*, 3 Merivale, 352, 395, Lord Eldon

decided that when it appears to have been the intention of the founder of a trust for religious worship that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution. The length and breadth of that decision may be the better estimated from the circumstance that the purpose declared in the deed was simply 'the worship and service of God.' And those words, without more, are deemed in England to create a trust for the established religion. Yet on its being clearly shown by proof that the purpose of the trust was to maintain dissenting doctrines, the court decreed that purpose to be carried into execution. And as there were no Unitarians known among the dissenters when the trust was created (A. D. 1701), the Unitarians were excluded from the trust. (7 Simons R. 290, S. C. upon the first decree.)" See also *Miller v. Gable*, 2 Denio, 492; *Baptist Church v. Witherell*, 3 Paige, 296; *Bowden v. McLeod*, 1 Edw. Ch., 588; *McGinnis v. Watson*, 41 Pa. St., 9; *Sutter v. Trustees*, 42 Pa. St., 503; *Winebrenner v. Colder*, 43 Pa. St., 244.

trustees of a religious association, to be forever afterward used as a place of religious worship according to the doctrines, form and discipline of a particular church, if the minister and trustees allow ministers of a different faith, not recognized by the church prescribed as the standard, to use the premises, they are guilty of a departure from the trust created by the original contract, and a court of equity may properly interfere to prevent the premises being used otherwise than in the manner prescribed by the terms of the trust.<sup>2</sup> So where property is conveyed to the trustees of a religious body to be used for church purposes, and it has been so used for a long and uninterrupted period, an unauthorized use and occupancy of the premises by persons not members of the religious society, thereby hindering and impeding the regular occupants of the church, will be enjoined, such trespass being continuous and irreparable.<sup>3</sup> So where property is conveyed to trustees in trust for a religious society of a certain denomination and is being used by them in accordance with the provisions of the trust, and a majority of the society withdraw and form an organization of a different denomination, an injunction will lie to restrain the latter from interfering with the use and possession of the church property by the minority.<sup>4</sup> Indeed, a religious society is regarded in a certain sense as the trustee of a charity, and as such peculiarly within the jurisdiction of equity for the purpose of preventing a diversion of the church property from the purpose of the original endowment. And where property is conveyed to the trustees of a church organization for religious purposes, in trust for the use of the particular church, the title to the property and the right to its enjoyment will be protected in those who continue to act in conformity with the laws of the church and who maintain their adherence thereto.

<sup>2</sup> Attorney-General *v.* Welsh, 4 Hare, 572; Hale *v.* Everett, 53 N. H., 9; Roshi's Appeal, 69 Pa. St., 462.

<sup>3</sup> Gilbert *v.* Arnold, 30 Md., 29.

<sup>4</sup> Cape *v.* Plymouth Church, 117 Wis., 150, 93 N. W., 449.



Where, therefore, some of the members take possession of the property, and, contrary to the constitution and discipline of the church, select a minister who is not a member in good standing of the church and not regularly elected, and close the church against its regular ministers, their action may be restrained by injunction.<sup>5</sup> And a society of a religious sect or denomination which becomes incorporated under a strictly denominational name, descriptive of the fundamental doctrines of the sect to which it belongs, will be presumed in equity to have been constituted for the purpose of advancing the doctrines of that especial sect or denomination. And if the trustees of such a society hold its property and temporalities in trust for its use, and the property has been so held for a long series of years and used for religious purposes and religious instruction in accordance only with the tenets of that particular sect, a court of equity may properly enjoin a misapplication of the property to the promotion of doctrines adverse to the denomination for whose benefit the trust was created. It may, therefore, restrain the employment of a minister to preach, or permitting any one to preach in the church, doctrines which are subversive of the fundamental principles of the particular sect in question.<sup>6</sup> So a minority of the officers and members of an independent church may be restrained from changing the form of worship and service, contrary to the established usages and principles of the church, and against the wishes of a majority of its officers and members.<sup>7</sup>

§ 306. **Limitation upon the rule dependent upon question of title.** To the general rule as above stated, authorizing equitable relief to prevent a diversion of church property or temporalities from the purposes of the original trust, there are some important limitations deserving of special notice. And

<sup>5</sup> *Roshi's Appeal*, 69 Pa. St., 462.  
See also *Bartholomew v. Lutheran*  
*Congregation*, 35 Ohio St., 567.

<sup>6</sup> *Hale v. Everett*, 53 N. H., 9.  
<sup>7</sup> *Hackney v. Vawter*, 39 Kan.,  
615, 18 Pac., 699.

in the first place it is to be observed that the right to relief is based largely upon the question of title to the church property, and when no title is shown the relief will be withheld, such a case being clearly distinguishable from that of persons claiming an equitable interest in property the legal title of which is in the religious society or its trustees, and who seek to prevent its diversion from the original trust. For example, when a religious association, claiming to own a church edifice, seeks to enjoin defendants from asserting title to the premises, alleging that a fraudulent and secret meeting of the church was held without notice, at which it was voted to convey the property to defendants, and that it was so conveyed, whereby complainant has been deprived of its use, but it is shown that complainant is not in fact a corporation and never held any title to the property, no ground for equitable relief exists and the bill will be dismissed.<sup>8</sup>

§ 307. **Distinction between ecclesiastical and corporate character of religious body.** Another limitation upon the general doctrine rests upon the distinction between the ecclesiastical and the corporate character of religious associations, and is worthy of especial notice in determining whether a proper case is made out to warrant the interference of a court of equity. Thus, where the trust as declared in the deed conveying property to a religious society is for the interests and purposes of such society, either for church or burial purposes, and it does not specify the ecclesiastical connection of the society or attempt to perpetuate any particular faith, the trustees take the property for the use of the society in its corporate rather than in its ecclesiastical capacity. It follows, therefore, that a majority of the members of the corporate society may, under such circumstances, change its ecclesiastical relations or connections, as well as the views which shall be taught from the pulpit, without subjecting themselves to the restraining power

<sup>8</sup> East Haddam Central Baptist Ecclesiastical Society, 44 Conn. Church v. East Haddam Baptist 259.

of a court of equity.<sup>9</sup> And the fact that the society has separated from the church with which it was originally connected and has united itself with another denomination does not constitute such a departure from the purposes of the original trust as to authorize the interference of equity, the property being still held in the same corporate capacity.<sup>10</sup>

§ 308. **Equity will not revise acts of church discipline.** Courts of equity, having no ecclesiastical jurisdiction, will neither revise nor question the ordinary acts of church discipline or the administration of church government. Their only power arising from the conflicting claims of the parties to the church property and its use, they will not decide as to the *status* of membership, and will not determine whether members have been properly or improperly excommunicated from a church, but accept the fact of their expulsion as conclusive proof that they are not members, and that, having been expelled by a vote of the church, they are no longer entitled to any of the rights or privileges of membership. Thus, where property has been conveyed in trust for the use and benefit of a religious organization, members of the church who have been excommunicated by a vote of the majority, but who still insist on their right to enjoy and use the church property, and who have taken possession and made periodical use of it without the consent and in defiance of the main body of the members, may be enjoined from interfering with or using the property.<sup>11</sup>

<sup>9</sup> *Burrel v. Associate Reformed Church*, 44 Barb., 282.

<sup>10</sup> *Burrel v. Associate Reformed Church*, 44 Barb., 282. And see *Petty v. Tooker*, 21 N. Y., 267; *Robertson v. Bullions*, 1 Kern., 243. It is to be observed, however, that the decisions in New York rest to a considerable extent upon the religious incorporation laws of that state.

<sup>11</sup> *Shannon v. Frost*, 3 B. Mon., 253. Say the court, Robertson, C. J.: "As the conveyance from Crittenden was to the use of the Baptist Church, as an organized body of professing Christians in Frankfort, every member of that church has a beneficial interest in the property thus conveyed, so long as he or she shall continue to be a member, but no longer. It is

§ 309. **The same.** The only ground upon which civil courts interfere in ecclesiastical cases being the protection of civil rights, they will not interfere with the exercise of any discretion on the part of church authorities and will not revise or correct the proceedings of ecclesiastical tribunals.<sup>12</sup> And an injunction will not be granted to restrain a bishop of a church from prosecuting the sentence of an ecclesiastical tribunal deposing a minister from his calling, a court of equity refusing under such circumstances to review the action of the church tribunal any further than to ascertain whether, according to the law of the church, such tribunal had jurisdiction in the premises.<sup>13</sup> And where complainant has by his own conduct waived all right to object to the authority of the

only as a constituent element of the aggregated body or church that any person can acquire or hold, as a *cestui que trust*, any interest in the property thus dedicated to that church. *Curd et al. v. Wallace et al.*, 7 Dana, 195. Such is the effect of this conveyance to congregational uses, and such the civil law of our state; and upon this foundation alone must our decision rest. The judicial eye of the civil authority of this land of religious liberty can not penetrate the veil of the church, nor can the arm of this court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excised members. When they became members, they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and can not invoke the supervision or control of that jurisdiction by this or any other civil tribunal.

Then, not being now members of the church to whose use the ground was conveyed, the appellants seem no longer to be entitled to any beneficial interest in that property, nor to any other right which this court can either enforce or recognize; and consequently the old church, as organized at the date of that conveyance, and still subsisting, must be deemed to be entitled to the exclusive use and enjoyment of the property for all the purposes for which it was first dedicated. And, as that right is of the character of a trust, is it not the duty of a court of equity to uphold it and secure its full and undisturbed enjoyment? Such was the purpose of the modified reinstatement of the injunction."

<sup>12</sup> Walker *v.* Wainwright, 16 Barb., 486; Chase *v.* Cheney, 58 Ill., 509.

<sup>13</sup> Walker *v.* Wainwright, 16 Barb., 486. The following observations of the court, Edmonds, J., are worthy of consideration: "The

bishop, or to the manner in which the ecclesiastical court was constituted, he can not afterward make such objections the foundation for enjoining the enforcement of their sentence and is debarred from relief in equity.<sup>14</sup>

§ 310. **Decisions of ecclesiastical tribunal conclusive as to canons of church.** The jurisdiction of ecclesiastical tribunals being conclusive as to ecclesiastical offenses, as well as upon doubtful and technical questions involving a criticism of the canons of a church, the civil courts will not revise the decision of such tribunals for the purpose of ascertaining or defining their jurisdiction, nor will they revise or question their construction and interpretation of the canons of the church. And where a rector is placed upon trial before an ecclesiastical tribunal of his church for non-conformity to its doctrines, he will not be allowed to enjoin its proceedings upon the ground of a misconstruction of the canons of the church and a want of authority in the spiritual court, the same objections hav-

view taken by me of one feature of this case will render unnecessary the examination of many of the questions which were discussed on the argument; and I shall, therefore, be silent in regard to them. The only ground on which this court can exercise any jurisdiction in this case is, that the threatened action of the defendant may affect the civil rights of the plaintiff, for the protection of which he has a proper recourse to the civil courts. The rights which are here invoked, for that purpose, are his exemption from taxation, and the performance of certain civil duties. Conceding (though without expressly ruling the point) that here is ground enough for the action of this court, it becomes material to say that the only cog-  
nizance which the court will take of the case is to inquire whether there is a want of jurisdiction in the defendant to do the act which is sought to be restrained. I can not consent to review the exercise of any discretion on his part, or at all inquire whether his judgment or that of the subordinate ecclesiastical tribunal can be justified by the truth of the case. I can not draw to myself the duty of revising their action, or of canvassing its manner or foundation, any further than to inquire whether, according to the law of the association to which both of the parties belong, they had authority to act at all. In other words, I can inquire only whether the defendant has the power to act, and not whether he is acting rightly."

<sup>14</sup> Walker v. Wainwright, 16 Barb., 486.



ing been made to that court and its jurisdiction having been sustained.<sup>15</sup> And the principle may now be regarded as too

<sup>15</sup> Chase *v.* Cheney, 58 Ill., 509. Thornton, J., delivering the opinion of a majority of the court, says, p. 533: \* \* \* "The minister, in a legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him; he seeks it. He accepts it with all its burdens and consequences; with all the rules, and laws and canons then subsisting, or to be made by competent authority; and can, at pleasure and with impunity, abandon it. If they were merciful and regardful of conscientious scruples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They can not, in any event, endanger his life or liberty; impair any of his personal rights; deprive him of property acquired under the laws; or interfere with the free exercise and enjoyment of religious profession and worship, for these are protected by the constitution and laws. While a member of the association, however, and having a full share in all the benefits resulting therefrom, he should adhere to its discipline; conform to its doctrines and mode of worship; and obey its laws and canons. If reason and conscience will not permit, the connection should be severed. 'The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it.' Forbes *v.* Eden,

*infra.* \* \* \* This case may then be briefly summed up: A rector in the church is charged with non-conformity to its doctrines—intentional omissions in the ministration of its ordinances; and the attempt is made to organize a court, composed of his brother clergymen, for his trial. He appeals to the civil court, and alleges, as the chief reason for interposition, the want of authority in the spiritual court to try him, and a misconstruction of the canons. The same point was made to that court and its power denied. It was urged with the same earnestness, and enforced with the same arguments there as here. That court overruled the objection and decided that it had jurisdiction. Five intelligent clergymen of the church presumed to be deeply versed in biblical and canonical lore were more competent than this court to decide the peculiar questions raised; why should we review that and not every other decision which involves the interpretation of the canons? It is conceded that when jurisdiction attaches, the judgment of the church court is conclusive as to purely ecclesiastical offenses. It should be equally conclusive upon doubtful and technical questions, involving a criticism of the canons, even though they might comprise jurisdictional facts. It requires no more intellect, information or honesty, to decide what is an ecclesiastical offense than to determine the authority of the court according to the canons.

well established to admit of controversy, that in the case of a religious congregation or an ecclesiastical body, which is itself but a subordinate member of some general church organization having a supreme ecclesiastical judicatory over the entire membership of the organization, the civil tribunals must accept the decisions of such church judicatory as final and conclusive upon all questions of faith, discipline or ecclesiastical rule, and the party aggrieved can not invoke the aid of the civil courts to have such proceedings reversed.<sup>16</sup>

\* \* \* Having given this case a most careful consideration, our deliberate judgment is that the ecclesiastical court ought not to be restrained by the mandate of this court." Lawrence, C. J., and Sheldon, J.: "We concur in the decision of the case at bar announced in the foregoing opinion, and we also concur in the opinion itself except as to one principle therein. We understand the opinion as implying that, in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts. This is a principle of so grave a character that, believing it to be erroneous, we are constrained to express our dissent upon the record. We concede that when a spiritual court has once been organized in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and the subject-mat-

ter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is that the association is purely voluntary, and when a person joins it, he consents that for all spiritual offenses, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized; and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood, by the action of a spiritual court unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself; and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable upon principle and authority."

<sup>16</sup> *Watson v. Jones*, 13 Wal., 679.

**§ 310 a. Court may determine jurisdiction of tribunal.**

While, as we have seen, the courts will not interfere with the judgments of the properly constituted ecclesiastical tribunals upon ecclesiastical questions, such as those of faith, discipline, construction of the canons of the church and the like, yet where the question is as to the jurisdiction of the tribunal itself or as to its organization in conformity with the rules and regulations of the church, the civil courts may properly en-

The governing principle in this class of cases is clearly enunciated in the opinion of Mr. Justice Miller, as follows, p. 726: \* \* \* "It is the case of property acquired in any of the usual modes for the general use of a religious congregation, which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government. The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation or its regular and legitimate successor, it is entitled to the use of the property. In the

case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the general assembly over all. These are all called, in the language of the church organs, judicatories, and they entertain appeals from the decisions of those below and prescribe corrective measures in other cases. In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that whenever the question of discipline, or of faith, or ecclesiastical rule, custom, or law has been decided by the high-

tain jurisdiction, and may grant relief by injunction where there is no other adequate means of redress.<sup>17</sup>

§ 311. **Deposed minister enjoined from serving.** Upon the question of the right to the preventive aid of equity to restrain a deposed minister from continuing to exercise his clerical functions in the church from which he has been removed, the courts have not been in exact harmony, the ground

est of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them in their application to the case before them." And see *Pounder v. Ashe*, 44 Neb., 672, 63 N. W., 48, overruling *Pounder v. Ashe*, 36 Neb., 564, 54 N. W., 847; *Harmon v. Dreher*, 1 Speer's Eq., 87; *State of Missouri ex rel v. Farris*, 45 Mo., 183.

<sup>17</sup> *Hatfield v. De Long*, 156 Ind., 207, 59 N. E., 483, 51 L. R. A., 751, 83 Am. St. Rep., 194. In this case the minister of a church had preferred charges against complainant, a member of the organization, and had called a trial which had resulted in a judgment of expulsion, from which complainant had taken an appeal. The organic law of the church provided for an appeal in such case to the quarterly conference, and for a trial on such appeal before a tribunal of five, two of whom were to be chosen by the accused, two by the members of the conference and the fifth by these four. Complainant had selected his two members of the tribunal, but the defendants, with the fraudulent intent of depriving him of the benefit of the appeal, had selected two of their own

number who had sat in judgment in the original trial. These two refused to consider the selection of anyone as a fifth except a member who was in sympathy with them. The bill prayed that the two ineligible be enjoined from sitting on the appellate tribunal and that all the defendants be enjoined from taking any steps against complainant until two competent persons had been selected. The relief was granted. The court say: "This court will have nothing to do with the charge of spiritual offenses. That is an ecclesiastical question purely. But the inquiry, whether or not the tribunal has been organized in conformity with the constitution of the church, is not ecclesiastical. It is the same question, and that only, that may arise with respect to any voluntary association, such as fraternal orders and social clubs. The assertion of jurisdiction in such case is not interference with the control of the society over its members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law."



of difference resting mainly upon diverging views as to whether such an act is an ordinary trespass, which may be remedied at law, or whether the trespass is of that continuing and irreparable nature which can be satisfactorily remedied only by the extraordinary aid of equity. Upon the one hand, it has been contended that a court of equity should not enjoin a deposed clergyman from continuing his ministrations in the church from which he has been deposed, since he thereby becomes a mere trespasser, without right, and the courts of law afford ample remedy for such a grievance.<sup>18</sup> Upon the other hand, it is held, and this doctrine has the clear weight of authority as well as principle in its support, that such an injury is of that continuous and irreparable nature that no rule of damages can rightly measure it, and that it therefore falls within the well defined range of the preventive aid of equity.<sup>19</sup> And where a minister, not chosen in accordance with the usages of the church and without authority legal or equitable to officiate as its minister, forcibly usurps the pastoral office and attempts to exercise its functions by officiating as pastor, contrary to the wishes of a majority of the church and declares his intention of continuing so to do for a long period in the future unless prevented by physical force, an injunction will be allowed, since the trespass is continuing in its duration and irreparable in its nature, there being no rule of law or measure of damages by which the injury resulting from a deprivation of the free enjoyment of religious worship may be estimated.<sup>20</sup> So where a chapel is conveyed to trustees for the use of a religious congregation, and the pastor is removed by a majority of the trustees acting in good faith, and he afterwards acting with a minority of the trustees obtains possession of the chapel and excludes the majority therefrom, an

<sup>18</sup> *German Church v. Maschap*, 2 Stockt., 57. 249. See *Pounder v. Ashe*, 44 Neb., 672, 63 N. W., 48, overruling *Pounder v. Ashe*, 36 Neb., 564, 54 N. W., 847.

<sup>19</sup> *Trustees v. Stewart*, 43 Ill., 81; *Perry v. Shipway*, 4 DeG. & J., 353, affirming S. C., 1 Gif., 1; <sup>20</sup> *Trustees v. Stewart*, 43 Ill., 81. *Cooper v. Gordon*, L. R. 8 Eq.,



injunction will lie in behalf of the majority of the trustees to prevent such use of the chapel.<sup>21</sup> And although no express provision is made for the appointment or removal of a minister, yet if by the terms of the deed conveying church property to a religious body the title is vested in trustees for the use of the congregation, and a minister has been dismissed by the action of a majority of the church members and trustees, such majority are entitled to an injunction to prevent the deposed minister from continuing to officiate in that capacity.<sup>22</sup> So when, under the organization of a church, a majority of its members have the right to control in church government and to select a pastor, and the pastor has been dismissed by the action of a majority, he may be restrained from exercising his functions, and his adherents may be enjoined from using or occupying the church without the consent of the majority.<sup>23</sup>

§ 312. **Pastor regularly chosen not enjoined.** An injunction will not, however, be granted for the purpose of ejecting a clergyman from his possession of a church and to prevent his preaching therein, when he is actually in office, having been placed there in the first instance by the act of the church and holding possession under claim of right, there being no other claimant of the pastoral office.<sup>24</sup> And where, in conformity with the usage and custom of an independent church, not connected with any religious denomination and governed by its own rules and customs, a pastor has been duly elected by a majority vote of the society, but the trustees, who have not the power of election, afterward decide upon the removal of the pastor, equity will not interfere in their behalf to restrain the pastor from officiating.<sup>25</sup> And where trustees, having control of its property in trust for a church, improperly close the church against the regular pastor, who is entitled under its

<sup>21</sup> *Perry v. Shipway*, 4 DeG & J., 353, affirming S. C., 1 Gif., 1.

<sup>22</sup> *Cooper v. Gordon*, L. R. 8 Eq., 249.

<sup>23</sup> *Hatchett v. Mt. Pleasant Baptist Church*, 46 Ark., 291.

<sup>24</sup> *Youngs v. Ransom*, 31 Barb., 49.

<sup>25</sup> *Trustees v. Proctor*, 66 Ill., 11.

canons to admission, an injunction will lie. And, the right being clearly established and its invasion being likely to result in serious injury, the injunction may be granted in the mandatory form to compel the opening of the church.<sup>26</sup>

§ 313. **Removal of minister not enjoined.** The civil courts recognize to the fullest extent the right of religious bodies to control their own internal affairs and to select their own ministers, in the absence of any obligations imposed upon them by the conveyances under which they hold their property. And where the deed conveying the property and buildings of a church is silent as to the mode of electing a minister and his continuance in office, and makes no provision for his salary or support, for which he is wholly dependent upon the voluntary contributions of the church members, a court of equity will not interfere to enjoin his removal by a vote of the church.<sup>27</sup>

§ 314. **Injunctions against trustees and church officers.** Any act upon the part of trustees of a religious society which obstructs the enjoyment of its property for the purposes and in the manner authorized by the usages of the church, is a departure from their trust which will be corrected in equity, such trustees holding the church property for the use of the beneficiaries and the utmost good faith being exacted in the performance of their trust.<sup>28</sup> Nor does the fact that a court of law may have concurrent jurisdiction in such a case by *mandamus*, or that a statutory remedy is provided, deprive the court of equity of its jurisdiction.<sup>29</sup> Thus, where the trustees have closed the church against the minister and those who desire to hear him, contrary to the wishes of a majority of the members, an injunction is the proper remedy, the grievance being a continuing act intended to prevent the com-

<sup>26</sup> *Whitecar v. Michenor*, 37 N. J. Eq., 6.

<sup>27</sup> *Porter v. Clarke*, 2 Sim., 520.

<sup>28</sup> *Brunnenmeyer v. Buhre*, 32 Ill., 183.

<sup>29</sup> *Id.*

plainants from exercising their right of worship in the church.<sup>30</sup> So trustees have been restrained by injunction from appointing a minister not duly qualified according to the doctrines and standard of the church.<sup>31</sup> And an injunction will be allowed in behalf of an incorporated church to restrain persons professing to act as church officers, but without authority, from withholding possession of the church property and temporalities which they have secretly and illegally usurped, and to restrain them from interfering with the property and records of the church, such acts being distinguishable from mere trespasses which may be remedied by an action at law.<sup>32</sup> And in such case the trustees of the church are proper parties complainant to the suit for an injunction against the pretended trustees, and the action need not be brought in the name of the state.<sup>33</sup> So where trustees of a religious society are merely naked trustees, holding and disposing of its property in conformity with the directions of the *cestui que trust*, which is the congregation, and the congregation has voted regularly to allow the pastor a given credit upon a bond given by him to the corporation, and the trustees, having acquiesced in the transaction, afterward institute an action upon the bond in disregard of the credit thus allowed, they may be restrained from prosecuting such action.<sup>34</sup> And where the trustees merely hold the temporal property of the church in trust for the congregation, with no authority to close the church building at their discretion, the pastor and the society being the depositaries of such authority according to the church customs and discipline, the

<sup>30</sup> *Brunnenmeyer v. Buhre*, 32 Ill., 183.

<sup>31</sup> *Milligan v. Mitchell*, 1 Myl. & K., 446. But the court refused that part of the motion which sought to restrain the trustees from allowing persons not properly qualified to officiate occasionally during the short period yet to

elapse before the hearing.

<sup>32</sup> *Lutheran Evangelical Church v. Gristgau*, 34 Wis., 328; *Trustees v. Hoessli*, 13 Wis., 348.

<sup>33</sup> *Trustees v. Hoessli*, 13 Wis., 348.

<sup>34</sup> *Worrell v. First Presbyterian Church*, 8 C. E. Green, 96.

trustees may be enjoined from closing the church and from preventing its use as a place of worship or business.<sup>35</sup> It is also worthy of notice that in matters of church regulation the courts give great weight to the views of members or corporators, even as against trustees or officers of the corporation. And in an action by the trustees of a religious organization against its minister to prevent him from removing the church building and temporalities to another location, if it appears that a majority of the corporators or members favor such removal, a court of equity will be inclined to give effect to their views and will refuse to enjoin in behalf of the trustees.<sup>36</sup>

§ 315. **The same, when refused.** While, however, the jurisdiction of equity to prevent any departure from the objects of a trust created for religious purposes is, as we have already seen, firmly established, the civil tribunals will not wrest from the properly constituted authorities of a church the right to exercise their discretion over matters properly within their own control. And a court of equity will not interfere upon the complaint of members of a church to restrain the trustees thereof from a sale of the church premises, the trustees being vested with full control over the affairs of the church and the sale being a matter entirely within their own discretion.<sup>37</sup> Nor does the fact that trustees of a religious association, contrary to the express terms of their charter, have intruded upon the functions of the minister or other officers of the church, constitute sufficient ground for the interposition of equity by injunction, the proper remedy being by *mandamus*.<sup>38</sup> But where church wardens are by law the guardians and keepers of the church and representatives of the body of the parish, they may restrain the incumbent

<sup>35</sup> *Morgan v. Rose*, 7 C. E. Green, 583. But the court hold the church corporation, as such, to be a necessary party to the proceeding.

<sup>36</sup> *Kulinski v. Fambrowski*, 29 Wis., 109.

<sup>37</sup> *Van Houten v. First Church*, 2 C. E. Green, 126.

<sup>38</sup> *Tartar v. Gibbs*, 24 Md., 323.

from dismantling the church and from removing the pews with a view to improvements.<sup>39</sup> And the managers of a religious society who have removed an agent for alleged misconduct have been allowed an injunction to prevent such deposed agent from interfering with their possession of the premises.<sup>40</sup>

§ 316. **Disturbance of burial ground enjoined.** It is not necessary that property should actually have been conveyed to the uses of a religious society to create a trust entitled to the protection of equity, and where real estate has been dedicated to religious uses and has been held and occupied by a church for religious purposes and as a burial ground for a period of fifty years, with the acquiescence of the original donor, his heirs will be enjoined from disturbing such possession and from attempting to regain the property.<sup>41</sup> And although the congregation is merely a voluntary society, never incorporated, and acting by committees or trustees chosen from time to time by vote of its members, such trustees, being in actual possession of the premises and acting by direction of the society to prevent any disturbance of that possession, are proper parties to maintain a bill for injunction.<sup>42</sup>

<sup>39</sup> *Cardinal v. Molyneux*, 7 Jur. N. S., 854, affirming S. C., *Ib.*, 254, 2 Gif., 535.

<sup>40</sup> *Spurgin v. White*, 2 Gif., 473.

<sup>41</sup> *Beatty v. Kurtz*, 2 Pet., 566.

<sup>42</sup> *Beatty v. Kurtz*, 2 Pet., 566. In the ornate language of Mr. Justice Story the court say: \* \* \* "The next question is, as to the competency of the plaintiffs to maintain the present suit. If they are proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession, under circumstances like those stated in the bill, we do not perceive any

serious objection to their right to maintain the suit. It is a case where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown Congregation of Lutherans. The property consecrated to their use by perpetual servitude or easement, is to be taken from them, the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceas-



So where land has been conveyed for use as a burial ground for members of a particular church, the conveyance limiting its use to the burial of members of that church, an injunction will be granted to prevent the interment therein of one who was not in communion with the church at the time of his death.<sup>43</sup>

§ 317. **When doctrinal questions investigated in equity.** The question of the extent to which a court of equity will investigate the doctrines and inquire into the modes of worship of a religious society is largely dependent upon the terms and conditions of the trust under which its property is held. And where property is conveyed to trustees for the use of a religious association upon the condition of its being forever used as a place of worship in accordance with the forms and doctrines of a particular church, such doctrinal points are proper subjects of investigation by the court in determining whether such a perversion of the trust exists as to warrant an injunction.<sup>44</sup> But where such investigation is not necessary for the protection and enforcement of the trust, the court will not institute any inquiries into doctrinal or polemical question.<sup>45</sup>

§ 318. **Violation of trust by one of two religious bodies ground for injunction.** Where property is conveyed in trust for the use of two unincorporated religious bodies, and one

ed are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It can not be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the

religious sensibilities of the living."

<sup>43</sup> *Dwenger v. Geary*, 113 Ind., 106, 14 N. E., 903.

<sup>44</sup> *Kniskern v. Lutheran Churches*, 1 Sandf. Ch., 439; *Miller v. Gable*, 2 Denio, 492; *Baptist Church v. Witherell*, 3 Paige, 296; *McGinnis v. Watson*, 41 Pa. St., 9; *Sutter v. Trustees*, 42 Pa. St., 503; *Winebrenner v. Colder*, 43 Pa. St., 244.

<sup>45</sup> *German Church v. Maschop*, 2 Stockt., 57.

of the two, in violation of the terms of the trust, takes exclusive possession, a proper case is presented for an injunction. Such a dispute is not merely as between tenants in common of realty, but it concerns the rights and privileges of members of unincorporated societies, and the remedy at law being inadequate, equity may properly interfere.<sup>46</sup>

§ 319. **Mere trespass not enjoined.** If the injury complained of is merely a trespass susceptible of adequate relief in an action at law, an injunction should not be allowed.<sup>47</sup> Thus, where two conflicting sects of a church were contending as to the right of possession of church property, and the party in actual possession had obtained an injunction restraining defendants from forcibly entering into the premises to bury their dead, the injunction was dissolved on the ground that the acts in question merely constituted a trespass and were not productive of irreparable injury.<sup>48</sup> So the relief will be denied where the legal remedy of ejectment is adequate.<sup>49</sup>

§ 319 *a*. **Injunction where question of trust involved, ejectment being inadequate.** Notwithstanding, however, the existence of a legal remedy, the courts are inclined to be liberal in granting relief by injunction, unless it appears that the remedy at law is fully as effective for the redress of the wrong complained of as that in equity. And where the question of title between two contending factions is incidental to and involves the determination of the trusts upon which the title is held, which are matters peculiarly within the province of a court of equity, the remedy by ejectment is not regarded as practical or adequate, and relief by injunction is properly granted.<sup>50</sup> And where one of the opposing factions was forcibly preventing complainants from entering the church and

<sup>46</sup> Kisor's Appeal, 62 Pa. St., 428.

<sup>48</sup> Miller v. English, 2 Halst. Ch.,

<sup>47</sup> Miller v. English, 2 Halst. Ch., 304.

304; Wehmer v. Fokenga, 57 Neb.,

<sup>49</sup> Wehmer v. Fokenga, 57 Neb.,

510, 78 N. W., 28; Fredericks v.

510, 78 N. W., 28; Fredericks v.

Huber, 180 Pa. St., 572, 37 Atl., 90.

Huber, 180 Pa. St., 572, 37 Atl., 90.

<sup>50</sup> Brundage v. Deardorf, 55 Fed.,

was threatening to destroy the church property rather than to allow complainants to use it, an injunction was held to be the proper remedy.<sup>51</sup> And where complainants, the deacons of a church and trustees of its property, have the power to determine by whom it may be used and to exclude those who refuse to recognize the authority of the regular organization, they may enjoin defendants who had been expelled from the church from interfering with their use and possession of the church property.<sup>52</sup>

839. In this case Taft, J., uses the following language: "The first contention in support of the demurrer is that a court of equity has no jurisdiction to consider the bill, because its averments show that the complainants have a plain and adequate remedy at law, in ejectment. I do not think this contention can be sustained. It is quite true that the complainants aver that they have the legal title to the property in controversy, but it appears from the bill that they hold it in trust for the use of the members of the local society whom they represent. It is also apparent that the controversy is with another set of trustees, who claim legal title for the purpose of maintaining the property for different uses under the same deed of trust. In other words, the question of title is to be determined by the character of the trust to which the property is to be devoted, and the action is to restrain the use of the property in perversion of the lawful trust. The property is, in a sense, brought into a court of equity, for the court to decide what use shall be made of it, and, by its equi-

table power of injunction, to enforce the proper use. The fact that in doing so it also has to determine the legal title will not oust the jurisdiction of a court of equity. The peculiar character of the possession by the church trustees, and of the use by the pastor and congregation, makes it clear that a mere action in ejectment would be quite inadequate as a remedy to secure the complainant trustees, and those whom they represent, the same peculiar possession and use for them. The writ of injunction is well adapted to prevent an unlawful intrusion in the pulpit by the pastor, and an unlawful use by the congregation, against all of whom it would be obviously impracticable to institute proceedings in ejectment. In the enforcement of a trust, where the circumstances are such that the remedy is not as complete at law as in equity, a trustee may appeal to a court of equity to assist him."

<sup>51</sup> *Richter v. Kabat*, 114 Mich., 575, 72 N. W., 600.

<sup>52</sup> *Fulbright v. Higginbotham*, 133 Mo., 668, 34 S. W., 875.

§ 320. **Diversion of church property to school purposes enjoined.** Where land is conveyed to a church to be used exclusively for religious purposes and for none other, an injunction will be granted to restrain a diversion of the property for school purposes, and the action may be brought by the pew owners of the church, they having sufficient interest in the property to make them proper parties complainant to the bill.<sup>53</sup> And the trustees of a church may be enjoined from leasing its property for school purposes contrary to the terms of the grant.<sup>54</sup> So when two religious associations had united in the building of a church, agreeing by their articles that it should be used only for divine services, and had for many years used it in common, permitting only meetings for public worship to be held therein, and one of the associations, without the sanction of the other and against its protest, introduced a Sunday school into the church, an injunction was granted against such use of the common property.<sup>55</sup>

§ 321. **Pew holders not allowed to enjoin trustees from rebuilding.** Pew holders in a church will not be allowed to enjoin the trustees from rebuilding when there is no impropriety in the disposition of the funds, and it is conceded that the old buildings are in a dilapidated condition and that a new edifice on the same location would be highly beneficial. Complainants in such a case will be left to the assertion of their legal and equitable rights in the new building when completed.<sup>56</sup> Even where the trustees are about pulling down the church for the purpose of using the materials in the erection of a new structure in a different location, the nature and extent of the injury are not such as to call for an injunction to protect the pew holders, and they will be left to their remedy at law.<sup>57</sup>

<sup>53</sup> *Howe v. School District*, 43 Vt., 282.

<sup>55</sup> *Gass's Appeal*, 73 Pa. St., 39.

<sup>56</sup> *Heeney v. Trustees*, 2 Edw.

<sup>54</sup> *Perry v. McEwen*, 22 Ind., 440.

Ch., 608.

<sup>57</sup> *Van Horn v. Talmage*, 4 Halst. Ch., 108.

§ 322. **Church property in receiver's hands protected by injunction.** If a court of equity has already acquired jurisdiction over the subject-matter in controversy, and has taken possession of the church property by its receiver, it will not permit any unwarrantable interference with such possession, and will protect its receiver, if necessary, by the process of injunction. Thus, where a receiver is appointed over certain church property, and a church warden, claiming to be legally entitled thereto, takes possession of the property by force and prevents the minister from holding services therein, the court will enjoin him from interfering with the premises, or with the performance of worship therein.<sup>58</sup>

<sup>58</sup> *Attorney-General v. St. Cross Hospital*, 18 Beav., 601.



## CHAPTER VI.

### OF INJUNCTIONS AFFECTING REAL PROPERTY.

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#### I. GENERAL FEATURES OF THE RELIEF.

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§ 323. **Equity averse to interference when relief may be had at law.** The numerous and complicated questions growing out of transfers of real property, as well as those which are connected with its possession and enjoyment, have given rise to frequent applications for the exercise of the extraordinary aid of equity by injunction. While, as we shall see, the decisions of the courts are not altogether harmonious in cases of this nature, they have generally been averse to any interference where the questions involved were such as might be determined in a legal forum. And it is only upon a clear showing of the inadequacy of the remedy at law that equity will assert its jurisdiction.

§ 324. **Relief granted only for fraud, accident or mistake; facts must be stated.** It may be laid down as a general rule that equity will not interfere with proceedings at law affecting the title to real estate in the absence of fraud, accident or mistake.<sup>1</sup> Thus, purchasers for a valuable consideration

<sup>1</sup> Rogers v. Cross, 3 Chand., 34; Evans v. Lovengood, 1 Jones Eq., Cameron v. White, 3 Tex., 152; 298. And in Cook v. Burnley, 45

and without notice of conflicting equities will not, on account of such equities, be enjoined from taking possession of premises under a judgment in ejectment in their favor, no fraud being alleged against them.<sup>2</sup> Nor will the loss of a deed necessary to complete a chain of title warrant the interposition of equity in the absence of fraud, accident or mistake.<sup>3</sup> So, too, a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment on which process issued was void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed.<sup>4</sup> Nor will a sale under execution be restrained, as between different creditors claiming liens thereon, upon the ground that a sale, pending the determination of such liens, would not realize the full value of the property, or upon the ground that, by reason of his poverty, complainant will be unable to bid for the premises at such sale.<sup>5</sup> Nor will a sale under execution be enjoined because of a misdescription of the premises, when the mistake is not such as to render the levy void and when the land may be readily identified.<sup>6</sup> And when an injunction is sought upon the ground of alleged injury to real estate, the facts must be stated which show that the injury is irreparable, and a mere allegation of irreparable injury will not suffice to warrant the relief.<sup>7</sup>

Tex., 97, it is said that an injunction in a litigation concerning real estate which restrains defendant from asserting any title to the land in controversy, either in any court, or "in any writing, or by printed publication, or by spoken words," if permissible at all, can only be supported upon very extraordinary grounds, established with great certainty of proof.

<sup>2</sup> *Evans v. Lovengood*, 1 Jones Eq., 298.

<sup>3</sup> *Rogers v. Cross*, 3 Chand., 34.

<sup>4</sup> *Morgan v. Whiteside's Curator*, 14 La., 277; *Cameron v. White*, 3 Tex., 152; *Union Iron Works v. Bassick Mining Co.*, 10 Col., 24, 14 Pac., 54.

<sup>5</sup> *Sanders v. Foster*, 66 Ga., 292.

<sup>6</sup> *Bogges v. Lowrey*, 78 Ga., 539, 3 S. E., 771.

<sup>7</sup> *Van Wert v. Webster*, 31 Ohio St., 421.

§ 325. **Defense at law a bar to injunction.** The fact that the ground relied upon as the foundation for an injunction can be urged as a defense at law is a sufficient reason for withholding the relief. And where a bill is filed to establish a legal title and for a perpetual injunction against proceedings at law connected therewith, in the absence of any allegation of inability to defend at law, the relief will be refused.<sup>8</sup> So legal proceedings affecting the title to real estate will not be restrained on the ground that plaintiff has no cause of action. Thus, the plaintiff in an action of forcible entry and detainer will not be enjoined from further prosecuting his action because he has no title, the title to the premises being in defendant, since such defense can as well be relied upon in the action itself.<sup>9</sup> Nor will equity interfere with the prosecution of actions of forcible entry and detainer where it does not appear that a certain and manifest irreparable injury will result unless the relief be allowed, and where there are no allegations of fraud, accident, mistake, or surprise.<sup>10</sup>

§ 326. **Only judgment creditors may enjoin disposition of debtor's property.** It is a well established rule that equity will not entertain jurisdiction to restrain a debtor from disposing of his property at the suit of a creditor whose demand is not yet reduced to judgment, and which constitutes no lien upon the property. Until his rights are fixed and established by judgment, a creditor is entitled to no control over his debtor's property and he will not be allowed to question its disposition or management. Any other rule than this would lead to unnecessary and often fruitless interruption of property rights by creditors at large whose demands might be utterly unfounded in law and incapable of being established by judgment.<sup>11</sup> In the application of this rule a judgment,

<sup>8</sup> DeGroot v. Receivers, 2 Green Ch., 198.

<sup>9</sup> Chadoin v. Magee, 20 Tex., 476.

<sup>10</sup> Crawford v. Paine, 19 Iowa, 172; Lamb v. Drew, 20 Iowa, 15.

<sup>11</sup> Wiggins v. Armstrong, 2 Johns. Ch., 144. And see Candler v. Pettitt, 1 Paige, 168. Upon this subject generally, see, *post*, § 1403 *et seq.*

to warrant the interference of a court of equity, must be such an one as constitutes a lien upon the real estate sought to be controlled. A foreign judgment will not therefore suffice, since, until reduced to judgment in the state where the injunction is sought, it constitutes no lien on the debtor's property. Until such judgment is established by the courts of the state where relief is sought, the judgment creditors have no other or different rights as to the property of their debtor than if their demand was not yet established at law.<sup>12</sup>

<sup>12</sup> *Buchanan v. Marsh*, 17 Iowa, 494. In this case suit was begun upon a judgment rendered in Canada, and an injunction was asked at the same time to restrain defendants from alienating or incumbering their real estate until the rights of the parties should be determined at law. Wright, C. J., delivered the opinion of the court, saying: "Plaintiffs are not judgment creditors. For the purposes of the present inquiry, their action is like any ordinary one upon a note, account, or any simple contract, or evidence of indebtedness. They have a foreign judgment; but until it becomes a judgment in our courts, they are no more than creditors at large, and until they obtain the recognition of their claim by the adjudication of our state tribunals, they have no other or different rights as to the property of their debtor than if their demand was indorsed by a less solemn or conclusive proceeding or instrument. For, however effectual such judgment may be, or whatever the faith and credit to which it may be entitled, it is very certain that it can not be enforced here until its validity

is recognized and passed upon by the judgment of our courts. \* \* \* This being so, upon common law principles, we know of no principle upon which plaintiffs were entitled to this injunction. The rule is, as far as we know, without exception, that the creditor must have completed his title at law, by judgment (if not by execution), before he can question the disposition of the debtor's property. *Angell v. Draper*, 1 Vern., 399; *Shirley v. Watts*, 3 Atk., 200; *Bennet v. Musgrove*, 2 Ves., 51; *Wiggins v. Armstrong*, 2 Johns. Ch., 144; *Jeremy's Eq.*, 161. The reason of the rule is, that, until the creditor has established his title, or his debt, by the judgment of a court, he has no right to interfere; for, unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. To establish any other rule, might lead to an unnecessary and perhaps fruitless and oppressive interruption of the exercise of the debtor's rights. 2 Johns. Ch., *supra*." But in *Joseph v. McGill*, 52 Iowa, 127, plaintiff who had attached real estate claimed to belong to the debtor and to have



§ 327. **Loss of conveyance ground for relief; stranger to title denied injunction.** Relief may sometimes be had against a sale of real property on the ground of unavoidable accident where great injury would result to complainant if the sale were allowed to proceed unchecked. Thus, where a conveyance of land is executed and delivered and the purchase price paid, but the conveyance is lost before being recorded, a sale of the premises by the heirs or representatives of the grantors may be enjoined, such sale being a fraud upon the rights of the grantees.<sup>13</sup> So a purchaser of real estate which is located in another state, who has paid part of the purchase money and received from his grantors a conveyance so defectively acknowledged as not to entitle it to record in the state where the land is located, may enjoin his grantors from selling the property to others.<sup>14</sup> But a stranger to the title, even though he be in possession, will not be permitted to enjoin the real owners from asserting their title on the ground that it was fraudulently obtained.<sup>15</sup>

§ 328. **Attempt to revoke dedication enjoined.** It may sometimes happen that the owner of lands is by his own acts estopped from exercising any subsequent control over them and may be enjoined from interference. Thus, a dedication of land to the use of the public, being in the nature of an estoppel *in pais*, equity will enjoin any attempt to revoke such dedication and to sell the land.<sup>16</sup> And where real estate has been for many years occupied by a church for pious uses with the knowledge and consent of the donor, his heirs will be perpetually enjoined from disturbing such possession, even though the dedi-

been fraudulently conveyed to a co-defendant, was allowed an injunction before judgment to prevent defendants from transferring the property in fraud of their creditors.

<sup>13</sup> *Wright's Heirs v. Christy's Heirs*, 39 Mo., 125.

<sup>14</sup> *Frank v. Peyton*, 82 Ky., 150.

<sup>15</sup> *Treadwell v. Payne*, 15 Cal., 496.

<sup>16</sup> *Mayor v. Franklin*, 12 Ga., 239.

eration may have been in such vague terms as not to be supported generally in equity.<sup>17</sup>

§ 329. **Mining property; fraudulent conveyance of land; recorder of deeds enjoined.** While as a general rule courts of equity look unfavorably upon applications for injunctions pending proceedings at law to determine the title to realty, there may be peculiar circumstances connected with the property rendering it imperative that the rule should be somewhat relaxed and the relief granted. Thus, where the title to mining property is in controversy, an injunction may be granted to preserve the property pending litigation to try the right, the exception resting upon the peculiar nature of the property in dispute.<sup>18</sup> So in an action to set aside a fraudulent conveyance of land and to recover possession of the premises on which a valuable crop is standing, an injunction has been allowed to prevent defendant from disposing of the land until the rights of the parties should be determined at law.<sup>19</sup> And while the remedy by injunction is not ordinarily employed to determine controverted questions of title, yet in a case of conspiracy by defendants to defraud the owner of his property, they may be enjoined from conveying, and the recorder may be enjoined from recording a fraudulent conveyance of the property.<sup>20</sup>

§ 330. **When sale of trust estate enjoined.** Although the protection and enforcement of trusts is a favorite branch of the jurisdiction of courts of chancery, it is not every case of a trust that will warrant relief by injunction. Thus, equity will not interfere to prevent the execution of a general power, in a trustee to sell lands for the benefit of others where it does not appear that the power is being inequitably or unjustly exercised.<sup>21</sup> But where land is conveyed to a corpora-

<sup>17</sup> Kurtz v. Beatty, 2 Cranch C. C., 699.

<sup>18</sup> Hess v. Winder, 34 Cal., 270.

<sup>19</sup> Corcoran v. Doll, 35 Cal., 476.

<sup>20</sup> Palo Alto B. & I. Co. v. Mahar, 65 Iowa, 74, 21 N. W., 187.

<sup>21</sup> Selden v. Vermilyea, 1 Barb.,

58.

tion in trust to be used for the purposes of a public street, the owner of property on such street is regarded as a *cestui que trust* with reference to such land, and may enforce the execution of the trust by restraining its violation.<sup>22</sup> And a remainder-man is entitled to an injunction until final hearing to prevent a sale of the trust estate under a judgment against the trustee or tenant for life in whom the title is vested.<sup>23</sup> But the *cestui que trust* of lands in a case where the trust is created for his own benefit, can not by investing his individual means in building upon the lands create a trust in his own favor to the prejudice of his judgment creditors. And the creditors may invoke the aid of equity to prevent such a diversion of the debtor's means, and on their application the payment of rents by the trustees to the debtor will be enjoined and a receiver appointed to apply the rents in payment of the judgment.<sup>24</sup> So when one has purchased land with his own money, the title being taken by a third person, so that a resulting trust exists in favor of the real purchaser, who is in possession, he may restrain the enforcement out of such land of a judgment against the holder of the legal title, the judgment creditor being chargeable with notice of the trust.<sup>25</sup> And where a trustee, holding the legal title to real estate for certain beneficiaries, has perverted his powers as trustee, misapplied the proceeds of sales of the trust estate and refused to account to the beneficiaries, he may be enjoined from a threatened sale of other portions of the property, his insolvency being shown.<sup>26</sup> So when plaintiff is in possession and has made valuable improvements under a parol agreement to convey and is entitled to a specific performance, he may enjoin creditors of his grantor from levying upon the land under judgments against the vendor, the agreement being made while the vendor

<sup>22</sup> Lawrence v. Mayor, 2 Barb., 577.

<sup>23</sup> Keaton v. Baggs, 53 Ga., 226.

<sup>24</sup> Johnson v. Woodruff, 4 Halst.

Ch., 120, affirmed by the Court of Appeals, Ib., 729.

<sup>25</sup> Ferrin v. Errol, 59 N. H., 234.

<sup>26</sup> Albright v. Albright, 91 N. C., 220.

was solvent and with no intention to defraud his creditors.<sup>27</sup> And where defendant had agreed with plaintiff to devise to her certain premises if she would live with and care for him during the remainder of his life, plaintiff having complied with the contract upon her part was allowed an injunction to restrain defendant from conveying the premises to a third person.<sup>28</sup>

§ 331. **Tenant for life and remainder-man; emblements.** As between the tenant for life and the remainder-man, it is held that mere apprehensions that the tenant is about to remove property from the estate are not sufficient foundation for an injunction against such removal, but such facts and circumstances must be set forth as will show that the apprehensions are well founded, and this being done equity may interfere.<sup>29</sup> And an isolated conversation between the tenant for life and the remainder-man, in which, under the influence of ardent spirits and excited by a quarrel, the former has threatened a removal of the property, will not warrant a court in granting an injunction.<sup>30</sup> Such facts and circumstances must be shown as are sufficient to constitute a reasonable ground for apprehending that the tenant for life intends the commission of a fraud, and thereby to defeat the ulterior estate by the destruction or removal of the property.<sup>31</sup> And where plaintiff seeks by his action the enforcement of a vendor's lien upon real estate, he is not entitled to an injunction to prevent the removal from the premises of emblements used in the cultivation of the land, which are not permanently attached thereto, and which have been placed upon the land after the sale under which the lien is claimed.<sup>32</sup>

<sup>27</sup> *Brown v. Prescott*, 63 N. H., 61.

<sup>28</sup> *Pflugar v. Pultz*, 43 N. J. Eq., 440, 11 Atl., 123.

<sup>29</sup> *Swindall v. Bradley*, 3 Jones Eq., 353.

<sup>30</sup> *Airs v. Billops*, 4 Jones Eq., 17.

<sup>31</sup> *Mercer v. Byrd*, 4 Jones Eq., 358.

<sup>32</sup> *McJunkin v. Dupree*, 44 Tex., 500.

§ 332. **Party-wall agreements; opening windows in party-wall enjoined.** Upon the question of relief by injunction against the breach of party-wall agreements between the owners of adjacent premises, the courts seem to be averse to extending their preventive aid *in limine*. And where plaintiff and defendants are adjacent lot owners and have entered into a party-wall agreement, a disregard of its terms by defendants in the construction of the party-wall will not justify an injunction before the final hearing when no irreparable injury is shown.<sup>33</sup> And where a mandatory injunction was sought to compel defendant to tear down a party-wall which projected a short distance upon plaintiff's premises, the relief was denied, leaving the plaintiff to his remedy in damages to be recovered in an action of trespass.<sup>34</sup> But the rule is well established that an injunction is the appropriate remedy to prevent an adjacent owner of real property from opening or using windows through a party-wall between the premises.<sup>35</sup> And a mandatory may properly be granted requiring the closing up of windows already opened.<sup>36</sup> And in such case the injunction will be broad enough to compel the defendant, not merely to patch up the openings, but to make the wall as solid as a party-wall should be.<sup>37</sup> An injunction is also the appropriate remedy to prevent the erection of additional stories on a party-wall in violation of the agreement of the parties.<sup>38</sup>

§ 333. **Injunction refused when party protected by lis pendens.** Relief by injunction against a transfer of real estate by defendant which the plaintiff seeks to prevent will ordi-

<sup>33</sup> *Barton v. Moffit*, 3 Ore., 29.

<sup>34</sup> *Mayer's Appeal*, 73 Pa. St., 164.

<sup>35</sup> *Dauenhauer v. Devine*, 51 Tex., 480; *Sullivan v. Graffort*, 35 Iowa, 531; *Harber v. Evans*, 101 Mo., 661, 14 S. W., 750, 10 L. R. A., 41, 20 Am. St. Rep., 646; *Dunscornb v. Randolph*, 107 Tenn., 89, 64 S. W., 21, 89 Am. St. Rep., 915; *Graves v. Smith*, 87 Ala., 450, 6

So., 308, 5 L. R. A., 298, 13 Am. St. Rep., 60.

<sup>36</sup> *Dunscornb v. Randolph*, 107 Tenn., 89, 64 S. W., 21, 89 Am. St. Rep., 915.

<sup>37</sup> *Bartley v. Spaulding*, 21 D. C., 47.

<sup>38</sup> *Calmelet v. Siehl*, 48 Neb., 505, 67 N. W., 467.



narily be refused when the effect of filing the bill, which operates as *lis pendens*, is to afford sufficient protection against the transfer of the property *pendente lite*.<sup>39</sup> And upon a bill to obtain the surrender and delivery of a deed, and to restrain defendant from disposing of the land upon allegations of fraud, where it is not shown that defendant is insolvent, and the fraud is denied by the answer and affidavits, and the only danger to be feared is that defendant may sell the land, and thus make the purchaser a necessary party to the litigation, equity will refuse to enjoin, since the doctrine of *lis pendens* affords sufficient protection in such a case against a purchaser *pendente lite*.<sup>40</sup>

§ 334. **Sale of purchase-money notes by vendor who has given bond for title.** When the vendor of real property, who has only given a bond for title, the fee still remaining in him, has transferred the notes received by him for the purchase-money, the fact that he is liable as indorser upon the notes and the purchaser is insolvent, will not warrant an injunction against a sale of the property, when it is not shown that the land is an insufficient security, or that it has depreciated in value, or that any waste has been or is about to be committed.<sup>41</sup> So one who has a vendor's lien upon land for unpaid purchase-money, and who afterward acquires the fee, a judgment lien having in the meantime attached to the land, can not restrain its sale under execution upon the judgment, since by giving proper notice of the existence of his lien his rights will be protected and a sale will be subject to his lien.<sup>42</sup>

§ 335. **When partition enjoined; sale under execution not enjoined after partition.** An injunction has been allowed to restrain defendant from proceedings for a partition of real

<sup>39</sup> *Smith v. Malcolm*, 48 Ga., 343;  
*Powell v. Quinn*, 49 Ga., 523.

<sup>41</sup> *Williams v. Stewart*, 56 Ga.  
663.

<sup>40</sup> *Smith v. Malcolm*, 48 Ga., 343.

<sup>42</sup> *Messmore v. Stephens*, 83 Ind.,

property until the repayment of purchase-money advanced by plaintiff for the purchase of defendant's interest. Thus, where complainant has paid the entire purchase-money upon a purchase of real estate, taking the title to himself and defendant jointly, upon the agreement of the latter to pay one-half of the purchase-money, and complainant has also paid taxes upon the premises and made valuable improvements thereon, he has been allowed an injunction to restrain defendant from proceeding with a partition suit until repayment of the amount due to complainant.<sup>43</sup> But the purchaser of real estate under a proceeding for partition takes it subject to the lien of existing judgments, and in the absence of fraud he will not be allowed, after his purchase, to enjoin a sale of the premises under execution upon such judgments.<sup>44</sup>

§ 336. **Mechanics' lien proceeding, when not enjoined.** Where, under the laws of a state giving a lien to mechanics for labor and materials furnished in the erection of buildings, the remedy for the enforcement of such lien is by an action at law, and equity has no jurisdiction to enforce or foreclose the lien, a court of equity will not enjoin a proceeding at law for the enforcement of such lien upon the application of another creditor claiming a lien of the same kind, merely because such creditor claims priority in equity over the lien of defendants in the injunction suit. Such a case, it is held, presents no ground for equitable relief, and the parties will be left to pursue their legal remedies in the courts of law.<sup>45</sup>

§ 337. **Dower proceeding; rents and profits; claimant under administrator's sale.** Upon a bill by an heir at law and devisee under the will of a deceased testator to have the widow's dower determined, to warrant an injunction against a transfer of the property and a receiver of the rents and profits *pendente lite*, it is not sufficient to allege merely that the rents are in jeopardy, but it must also be shown how they are jeop-

<sup>43</sup> *Maloy v. Sloan*, 44 Vt., 311.

<sup>45</sup> *Hall v. Hinckley*, 32 Wis., 362.

<sup>44</sup> *Wood v. Winings*, 58 Ind., 322.

ardized. And in such case, in the absence of any allegation that the rents and profits of the realty supposed to be subject to dower will be lost by reason of the insolvency of those receiving them, or that the plaintiff has not an adequate remedy at law for such of the rents as he may be entitled to, the relief will be denied.<sup>46</sup> So where plaintiff, claiming title to realty under an administrator's sale, obtains an injunction against the heirs to restrain them from asserting title to the property, but fails to make out a satisfactory title to the premises, the injunction will be dissolved.<sup>47</sup>

§ 338. **Effect of conveyance made by one enjoined.** As regards the effect of a conveyance of real estate made by one who is enjoined from conveying, it is held that where defendant proceeds to execute a conveyance in defiance of an injunction prohibiting him from so doing, the effect of the injunction is only to render the conveyance inoperative so far as concerns the interest of the complainants in whose behalf the relief was allowed.<sup>48</sup>

§ 339. **Judgment creditor not enjoined by legatees or devisees.** As between judgment creditors and devisees of a specific portion of the estate of a deceased debtor, equity will not usually interfere in behalf of the devisees. Thus, where a creditor has obtained a decree specifically authorizing a levy upon the estate that belonged to the debtor at the time of his death, in whosoever hands the same may be, he will not be enjoined at the suit of specific legatees or devisees from levying upon that portion of the estate devised to them, on the ground that the testator had set apart a particular portion of his estate for the payment of his debts. In such a case the legatees are regarded in equity merely as volunteers, whose rights are subordinate to those of the judgment creditors.<sup>49</sup>

<sup>46</sup> *Knighton v. Young*, 22 Md., 359.

<sup>48</sup> *Greenwald v. Roberts*, 4 Heisk., 494.

<sup>47</sup> *Casanave v. Spear*, 23 La. An., 519.

<sup>49</sup> *Maxwell v. Maxwell*, Charl. R. M., 462.

Nor will one of several joint devisees of land be restrained from entering thereon and taking possession of a portion of the estate devised to them separately, where the injunction is asked by a tenant claiming under the other devisees.<sup>50</sup> But a legatee entitled to a distributive share of an estate may have an injunction until the hearing to restrain the executor of the estate from levying an execution upon real estate, the proceeds of which if collected would be assets to which the legacy would attach.<sup>51</sup> And where one of the heirs of an intestate received an advancement during the life of the deceased in full of his share of the estate, a sale of the intestate's land under a judgment against the heirs was enjoined.<sup>52</sup>

§ 340. **Writ of restitution not enjoined.** Questions growing out of litigation concerning title to real property, and which are properly determinable in a legal forum, will not be recognized as the foundation for relief in equity against the proceedings. And where, under a conviction of forcible entry and detainer, a writ of restitution is awarded the successful party, equity will not enjoin proceedings for the enforcement of the writ upon the ground that complainant in the injunction suit is the rightful owner of the land under an older title.<sup>53</sup> Nor will a writ of restitution be enjoined where no grounds of irreparable injury are shown, and where the real purpose of the bill is to quiet complainant's possession and to suppress future litigation concerning the property.<sup>54</sup>

<sup>50</sup> *Baldwin v. Darst*, 3 Grat., 132.

<sup>51</sup> *Dorsey v. Simmons*, 49 Ga., 245.

<sup>52</sup> *Dyer v. Armstrong*, 5 Ind., 437.

<sup>53</sup> *Hamilton v. Hendrix's Heirs*, 1 Bibb, 67.

<sup>54</sup> *Tevis v. Ellis*, 25 Cal., 515. Shafter, J., delivering the opinion of the court, says: "The principal purpose of this action is to obtain a decree quieting the possession of the plaintiff and sup-

pressing future litigation at law by perpetual injunction. If it appeared by the complaint and affidavit that the defendants were doing or were threatening to do, or were procuring to be done, or were suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, or tending to the great and irreparable

§ 341. **Judgment for breach of covenants, when enjoined.** A court of equity may properly compel the purchaser of land to accept a good title tendered by the personal representatives of his grantor, who had sold with covenants of warranty, notwithstanding the purchaser has obtained judgment for the breach of covenants contained in his grantor's deed; and under such circumstances the court will award an injunction against the enforcement of the judgment.<sup>55</sup>

§ 342. **Entry under right reserved; relief against penalty in deed of trust.** An entry upon land under rights reserved to the grantor by the contract of sale will not of itself warrant the interference of equity. Thus, a vendor who has merely given a bond for conveyance with a provision that he may re-enter in case of default in payment of the purchase-money, will not be enjoined from re-entering if the purchaser is in default.<sup>56</sup> But the relief has been allowed against a stipulation in the nature of a penalty in the bond or deed of trust. Thus, where it was provided that in case of default of the debtor to pay the annual interest the principal should be deemed due and payable, the provision being construed in the nature of a penalty, relief has been allowed against its enforcement.<sup>57</sup>

§ 343. **Fruit trees and shrubbery; confusion of boundaries; tenants in common.** An injunction is the proper remedy in behalf of a vendee in possession to restrain the vendor from the removal of fruit trees and ornamental shrubbery, notwithstanding vendor claims the right to such removal under a verbal reservation. Such improvements are considered as

injury of the plaintiff, an injunction might go, staying the act in view of its consequences. But the complaint does not present a case of that impression. It charges, as a ground for the injunction, that the defendants intend to dis seize the plaintiff of his lands—that, and no more; and asks that they may be restrained from carrying

their purpose into execution. Should the defendants succeed in their design, the remedies at law would be speedy, adequate and complete. The order dissolving the injunction is affirmed."

<sup>55</sup> *Reese v. Smith*, 12 Mo., 344.

<sup>56</sup> *Boyd v. Lofton*, 34 Ga., 494.

<sup>57</sup> *Mayo v. Judah*, 5 Munf., 495.



passing with the realty and the right of the purchaser will be protected in equity.<sup>58</sup> It is, however, incumbent upon complainant to set forth clearly the facts and circumstances on which he relies for relief, and to warrant an injunction against proceedings at law on the ground of confusion of boundaries complainant must allege the fact of such confusion and the circumstances producing it.<sup>59</sup> But an injunction may be granted to prevent the execution of a writ of *habere facias possessionem*, under a judgment in ejectment, until the true boundary line of the premises to be surrendered can be determined, when such line is in doubt and when the execution of the writ upon the boundary as claimed by plaintiff in ejectment would result in irreparable injury to plaintiff in the injunction suit.<sup>60</sup>

§ 344. **Injunctions as between tenants in common.** Relief by injunction is sometimes allowed between tenants in common for the purpose of preserving the estate and preventing serious injury. Thus, a judgment at law for the partition of real estate at the suit of some of the tenants in common may be enjoined by the other tenants upon an allegation that the partition can not be made without serious injury to the owners. And under such circumstances the injunction should be continued to the hearing, that the court may upon the proofs decide whether the partition would be for the interest of the parties.<sup>61</sup> But as between tenants in common of realty, equity will not enjoin one tenant from selling crops from the premises when there is no such destruction of the estate as amounts to waste, even after a decree for a partition of the premises.<sup>62</sup> And pending a proceeding in equity for partition and before its completion, the parties being tenants in common until such completion, equity will not interfere by injunction with the

<sup>58</sup> *Smith v. Price*, 39 Ill., 28.

<sup>59</sup> *Foster, Ex parte*, 11 Ark., 304. 183.

<sup>60</sup> *Jones v. Brandon*, 60 Miss., 556.

<sup>61</sup> *Gash v. Ledbetter*, 6 Ired. Eq.,

<sup>62</sup> *Bailey v. Hobson*, L. R. 5 Ch., 180.

existing possession of the premises, nor will it enjoin one of the co-tenants from proceeding to collect his portion of the rent due prior to the partition.<sup>63</sup> But a plaintiff claiming a moiety of an estate as a tenant in common with the defendant, and being entitled to a receiver of the rents and profits of the moiety claimed, may have an injunction to prevent defendant from receiving such rents and profits.<sup>64</sup> And the co-owner of shade trees standing upon the boundary line between his and the other co-owner's property is entitled to an injunction to restrain the latter from cutting down such trees.<sup>65</sup> And where the deed under which tenants in common hold title to real estate provides that an alley extending across the premises shall be kept open for the benefit of adjoining owners, one of the tenants in common may enjoin the obstruction of the alley by the other.<sup>66</sup>

§ 345. **Sale of trust property, when enjoined; waiver of lien by judgment creditor.** Where a judgment creditor is attempting to enforce his judgment by a sale of real estate conveyed by the debtor in trust before the debt on which the judgment was rendered was incurred, an injunction may be allowed to restrain the sale until the question of whether the trust was created in fraud of creditors can be determined.<sup>67</sup> And where the creditor may collect his judgment out of property which his debtor has not conveyed, but refuses or fails to do so, he may be enjoined from proceeding with the enforcement of his judgment against property which has passed to a grantee of the debtor, and as to which the judgment creditor has waived his lien.<sup>68</sup>

§ 346. **Commissioner in chancery, when enjoined from sale.** Courts of chancery have power to restrain the proceedings

<sup>63</sup> *Hughes v. D'Arcy*, 1. R. 8 Eq., 484, 32 Am. St. Rep., 305.

71. <sup>66</sup> *Swift v. Coker*, 83 Ga., 789,

<sup>64</sup> *Hargrave v. Hargrave*, 9 Beav., 10 S. E., 442, 20 Am. St. Rep., 347.

549. <sup>67</sup> *McCann v. Taylor*, 10 Md., 418.

<sup>65</sup> *Musch v. Burkhart*, 83 Iowa, <sup>68</sup> *Hurd v. Eaton*, 28 Ill., 122.

301, 48 N. W., 1025, 12 L. R. A.,

of their own officers, if necessary, and a special commissioner in chancery appointed to sell lands under a decree may be enjoined in a proper case, he occupying the same position that a sheriff would under like circumstances. But in enjoining proceedings under a decree for the sale of realty, the court will not inquire into the rights of parties existing antecedent to the rendering of the decree and which might have been inquired into at that time.<sup>69</sup>

§ 347. **Irregularities in municipal proceedings no ground for injunction.** Mere irregularities in the proceedings of municipal tribunals in the sale of lands for taxes, or in the opening of streets for the public benefit, will not warrant equity in interfering to restrain such proceedings, since a court of equity will not sit as a court of errors to review the action of other tribunals.<sup>70</sup> Thus, alleged irregularities in a sale of lots for taxes afford no ground for the interference of equity to restrain the purchaser from afterward selling the same lots, the two sales being entirely independent of and distinct from each other.<sup>71</sup> Nor will a court of equity interfere to restrain the enforcement of judgments rendered against complainant for the benefit of his property by the opening of certain streets, on the ground of defects and irregularities in the proceedings, the proper remedy for such grievances being by *certiorari*.<sup>72</sup>

§ 348. **Delay in giving deed.** Where a purchaser in compliance with the contract of sale has actually paid the purchase price, but the vendor has delayed for three years to give title, the vendor will not be allowed to enjoin proceedings at law to recover the amount paid, without showing some equitable excuse for his delay in giving a deed.<sup>73</sup>

§ 349. **Municipal authorities enjoined from encroaching on private property.** A municipal corporation may be restrained

<sup>69</sup> *People, etc. v. Gilmer*, 5 Gilm., 242.

<sup>70</sup> *St. Louis v. Goode*, 21 Mo., 216; *Ewing v. St. Louis*, 5 Wal., 413.

<sup>71</sup> *St. Louis v. Goode*, 21 Mo., 216.

<sup>72</sup> *Ewing v. St. Louis*, 5 Wal., 412.

<sup>73</sup> *Anderson v. Frye*, 18 Ill., 94.

from encroaching upon the property of private citizens, although such encroachments are made under pretense of preventing the obstruction of public streets.<sup>74</sup> The jurisdiction is exercised in such cases on the ground of quieting title, and where complainant has been for twenty years in continued and adverse possession of public ground or of a public street, he is entitled to the aid of equity to prevent the municipal authorities from interfering.<sup>75</sup>

§ 350. **Removal of barracks; ditch on public domain.** Officers of the government will not be restrained from removing temporary buildings erected as barracks and a military hospital, the buildings not being incorporated into the soil, and there being no assertion of title on the part of the government, or of an intention to retain adverse possession of the realty.<sup>76</sup> Nor will a defendant be enjoined from doing upon the public domain that which he is authorized by the paramount law to do, as the running of water through a completed ditch dug through an open, unoccupied and uncultivated portion of the public domain, which is used only for grazing purposes by complainant.<sup>77</sup>

§ 351. **Disinterment of bodies, when not enjoined.** Where land has been conveyed to a religious congregation which uses it for burial purposes, and commissioners are afterward appointed by act of legislature to sell the ground and remove the bodies interred to other ground purchased with the proceeds of the sale, lot owners in the original burial ground will not be allowed to enjoin the disinterment of the bodies, the legislature having the paramount right to the control of the property in such manner that it shall not be injurious to others.<sup>78</sup>

<sup>74</sup> *Dudley v. Trustees*, 12 B. Mon., 610.

<sup>76</sup> *Meigs' Appeal*, 62 Pa. St., 28.

<sup>77</sup> *Rivers v. Burbank*, 13 Nev.,

<sup>75</sup> *Dudley v. Trustees*, 12 B. Mon., 610.

398.

See also *Manchester Cotton Mills v. Town of Manchester*, 25 Grat., 825.

<sup>78</sup> *Kincaid's Appeal*, 66 Pa. St.,

411.

§ 352. **Sale of school property under execution enjoined.** In Missouri it is held that an execution can not be levied upon a building used for school purposes, or upon the real estate on which it stands, and that an injunction will lie to prevent a sale of such property under execution.<sup>79</sup>

§ 353. **Enjoining removal of fixtures, not a conversion of fixtures.** An injunction has been granted in behalf of the owners of a mill to prevent the sale under execution of an engine and boiler which were fixtures of the mill.<sup>80</sup> But the obtaining and serving an injunction restraining the removal of fixtures from real estate does not amount to a conversion of such fixtures so as to entitle defendant in the injunction suit to maintain trover therefor.<sup>81</sup>

§ 353 *a*. **Judgment sale of realty in bulk.** The sale under execution of several parcels of real estate in bulk instead of in separate pieces is a fraud in law and void where it appears that the value of the property is greatly in excess of the amount of the judgment to be satisfied; and in such case, an injunction may be granted to restrain the sheriff and the purchaser at the sale from turning plaintiff out of possession.<sup>82</sup>

<sup>79</sup> *State v. Tiedemann*, 69 Mo., 306. As to the allegations sufficient to warrant an injunction against a guardian's sale of real property in Indiana, see *Scott v. Silvers*, 64 Ind., 76.

<sup>80</sup> *Patton v. Moore*, 16 West Va., 428.

<sup>81</sup> *Lacey v. Beaudry*, 53 Cal., 693.

<sup>82</sup> *Forbes v. Hall*, 102 Ga., 47, 28 S. E., 915, 66 Am. St. Rep., 152.



## II. INJUNCTIONS IN AID OF POSSESSION.

- § 354. English Court of Chancery averse to interfering with possession.
- 355. Possession not enjoined when title not established at law.
- 356. Injunction allowed when defendant's possession an interruption of plaintiff's.
- 357. Loss of conveyance; proceedings to which plaintiff is not a party.
- 358. Neglect to execute decree for conveyance ground for injunction.
- 359. Possession without legal title; remedy at law.
- 360. Remedy at law a bar to injunction.
- 361. Fraudulent purchase at sheriff's sale.
- 362. Equity will not correct errors at law; heirs at law and devisee.
- 363. Effect of long and peaceable possession.
- 364. Fraudulent conduct by defendant.
- 365. Tender of purchase money at illegal sale; injunction of state court to prevent possession under sale under judgment in United States court.
- 366. When defendant not enjoined from leasing.
- 366a. Receiver's possession protected by injunction.

§ 354. **English Court of Chancery averse to interfering with possession.** Upon the question of the extent to which courts of equity may interfere by injunction in aid of the possession of real property, or may grant the aid of this extraordinary remedy in matters affecting such possession, a marked reluctance to the exercise of the jurisdiction may be observed running through all the cases. This reluctance has always been noticeable in the decisions of the English Court of Chancery upon questions affecting possession, and from a comparatively early period that court appears to have been averse to the granting of injunctions in aid of the possession of real property.<sup>1</sup> This extreme reluctance is traceable to the fact that that court usually declined to entertain jurisdiction of controversies determining the title or right to possession of real property, leaving all such controversies to be determined in a legal forum, by the ordinary and accustomed legal remedies.

<sup>1</sup> See Lady Poine's Case, 1 Vern., 156.

And while in modern times the stringency of the earlier English doctrine has been somewhat relaxed, yet this branch of the jurisdiction can hardly be said to be a favorite one with courts of equity, and its exercise is guarded by a careful adherence to certain fixed and well settled principles which are now to be stated.

§ 355. **Possession not enjoined when title not established at law.** As a general rule courts of equity will not interfere by preliminary injunction to change the possession of real property, the title being in dispute, and to transfer it to one whose rights are not yet established at law.<sup>2</sup> Nor should an injunction be allowed for the mere purpose of restraining naked trespasses to realty, or for quieting the possession of one who shows no title.<sup>3</sup> And where one has been erroneously put in possession of land under a writ of restitution, his title not having been established at law, equity will refuse to enjoin proceedings instituted for the purpose of recovering possession of the premises, the denial of relief being based upon the fact that complainant's title is not yet established.<sup>4</sup> So where a defendant has been wrongfully put out of possession of real property by an abuse of legal process, and the court has awarded a writ of restitution to restore him, it will not pass upon the further rights of the parties until he has been restored to possession, and will not, therefore, entertain a motion to enjoin the issuing of the writ of restitution, no new matter having intervened since the granting of such writ.<sup>5</sup> And a plaintiff, having title to real estate and being in possession, can not have an injunction in aid of his possession against defendants when it is not shown that they have dis-

<sup>2</sup> Erie R. Co. v. Delaware R. Co., Springs Co. v. Ferguson, 7 S. Dak., 6 C. E. Green, 283; Arnold v. 503, 64 N. W., 539.

Bright, 41 Mich., 207, 2 N. W., 16; <sup>3</sup> Conway, *Ex parte*, 4 Ark., 302; Toledo, A. A. & N. M. R. Co. v. McGee v. Smith, 1 C. E. Green, 462.

Detroit, L. & N. R. Co., 61 Mich., <sup>4</sup> Thompson v. Engle, 3 Green 9, 27 N. W., 715; Catholicon Hot Ch., 271.

<sup>5</sup> Perry v. Tupper, 71 N. C., 385.

turbed his possession, and when the title under which defendants claim does not constitute a cloud upon plaintiff's title.<sup>6</sup>

§ 356. **Injunction allowed when defendant's possession an interruption of plaintiff's.** Notwithstanding the general rule as stated in the preceding section, by which courts of equity refuse to interfere with possession before the right is determined at law, if defendant's possession is but an interruption of the prior possession of complainant whose right is clear and certain, an injunction may be allowed without compelling complainant to establish his title by an action at law. The interference in such case rests, as in cases of nuisance, upon a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which upon just and equitable grounds ought to be prevented.<sup>7</sup> So when a purchaser at a sheriff's sale has been put in possession in violation of an injunction, a mandatory injunction is proper to restore the possession which has thus been wrongfully changed.<sup>8</sup> And plaintiff, who has been placed in possession after a recovery in ejectment, has been allowed to restrain defendant in the ejectment suit from depriving him of and interfering with such possession.<sup>9</sup> And the relief may be allowed for the purpose of quieting and protecting plaintiff's possession which is constantly invaded and interfered with by defendants who are insolvent, the jurisdiction in such case being exercised for the prevention of irreparable injury and a multiplicity of suits.<sup>10</sup> And a vendee who is in peaceable possession under his contract, pending his action for specific performance, is entitled to an injunction to protect his possession.<sup>11</sup> So where plaintiff, suing *in forma pauperis* for the

<sup>6</sup> *Gaskins v. Peebles*, 44 Tex., 390.

<sup>10</sup> *Mulry v. Norton*, 100 N. Y., 424, 3 N. E., 581.

<sup>7</sup> *Conway, Ex parte*, 4 Ark., 302.

<sup>11</sup> *Hadfield v. Bartlett*, 66 Wis.,

<sup>8</sup> *Klinck v. Black*, 14 S. C., 241. 634.

<sup>9</sup> *Romero v. Munos*, 1 New Mexico, 314.

recovery of land, takes possession of part and resists its re-occupation by defendant, the latter may be allowed an injunction to restrain plaintiff from further interference until the hearing.<sup>12</sup> And where the owner of land sells a mill situated thereon, upon condition that the title shall not pass until payment is fully made, the purchaser may be enjoined from removing the mill beyond the state, his insolvency being shown.<sup>13</sup> And where the plaintiff has obtained a judgment for the possession of land in an appropriate action, an injunction will lie to restrain the defendant from interfering with the execution of a writ of possession.<sup>14</sup>

§ 357. **Loss of conveyance; proceedings to which plaintiff is not a party.** Where, from the peculiar circumstances of the case, it is impossible for defendant to establish his defense at law in an action to recover possession, the strictness of the rule may also be departed from. Thus, the loss of one conveyance in a chain of title which is necessary to establish the defense to the action will warrant equity in restraining proceedings, as well upon the ground of accident as to prevent a cloud upon title. Under such circumstances defendant being prevented by accident from perfectly and adequately asserting his title at law, he is entitled to the aid which equity alone can give.<sup>15</sup> So where complainant, without fault upon his part, has had no opportunity of being heard at law, he may have the aid of equity to protect him in his possession as owner of the premises. Thus, a perpetual injunction will be allowed against the execution of a writ of *habere facias possessionem* against the premises of one who was not a party to the litigation.<sup>16</sup> And one who is in the quiet possession of real estate, claiming title thereto, may have an injunction to

<sup>12</sup> Horton v. White, 84 N. C., 297.

<sup>13</sup> Coe v. Johnson, 93 Ind., 418.

<sup>14</sup> Hawkins v. McDougal, 126 Ind., 539, 25 N. E., 708.

<sup>15</sup> Butch v. Lash, 4 Iowa, 215.

<sup>16</sup> Goodnough v. Sheppard, 28

Ill., 81; Panton v. Manley, 4

Bradw., 210; Charter Oak Life Ins. Co. v. Cummings, 90 Mo., 267, 2 S.

W., 397.

restrain others from dispossessing him by means of process growing out of litigation to which he was not a party.<sup>17</sup>

§ 358. **Neglect to execute decree for conveyance ground for injunction.** Where proceedings have been instituted in a court of equity to establish the title to real estate, and a decree has been rendered that defendant make a conveyance vesting the legal title in complainant, neglect to execute such decree will warrant a mandatory injunction to deliver possession. In such case equity proceeds upon the principle that its decree, not having been complied with, operates as a conveyance, and the right being sufficiently established an injunction is a proper remedy for its enforcement; otherwise complainant might be compelled to resort to proceedings in ejectment to obtain the possession to which he is already entitled by the decree, and thus be greatly delayed and embarrassed.<sup>18</sup>

§ 359. **Possession without legal title; remedy at law.** In general equity will not interpose to prevent the enforcement of a legal right except upon a clear and satisfactory showing of a right superior to that which it is sought to restrain. In accordance with this principle a party in possession of real estate, but without legal title, has no sufficient equities as against the legal owner to enjoin a writ of restitution which has been granted him for the purpose of obtaining possession

<sup>17</sup> *Banks v. Parker*, 80 N. C., 157; *Deans v. Bowden*, 20 Fla., 905; *Williamson v. Russell*, 18 West Va., 612.

<sup>18</sup> *Garretson v. Cole*, 1 Har. & J., 373. It is proper to remark that the decision of the chancellor in this case rests partially upon an act of legislature. Hanson, Chancellor, observes: "An injunction for possession is not a new thing in a court of equity. It has long been used in England; it is directed in certain cases by the aforesaid act of assembly; and it

would disgrace our laws and administration of justice if, after a title to land has been established by the adjudication of a court, there could be no way of obtaining possession but after obtaining judgment in ejectment." So it is said by an eminent jurist that "Courts of equity also interfere and effectuate their own decrees in many cases by injunctions, in the nature of a judicial writ or execution for possession of the property in controversy; as for example, by injunctions to yield



of his premises.<sup>19</sup> And to warrant a court of equity in enjoining proceedings to recover possession of realty it must clearly appear that he who seeks the relief is remediless by the usual course of proceedings at law. This not appearing, and it not being shown that the parties against whom the injunction is sought are insolvent, the writ will not be allowed.<sup>20</sup>

§ 360. **Remedy at law a bar to injunction.** The general principle underlying the entire jurisdiction of equity by injunction, that the relief will not be granted where adequate remedy may be had at law, applies with equal force to cases where relief is sought in aid of the possession of real property. Wherever, therefore, sufficient redress may be had in the courts of law, parties will be left to pursue their remedy in a legal rather than an equitable tribunal.<sup>21</sup> Thus, where parties are in possession claiming as devisees under a will which has been admitted to probate, equity will not, pending an appeal from the decision of the probate court, aid an adverse claimant by injunction to remove them, since full and adequate redress may be had at law.<sup>22</sup> So where the object of an injunction bill is merely to obtain possession of land upon which defendant has entered and committed trespasses and removed the products of the land, the relief will be denied, the remedy at law being ample and complete for the recovery

up, deliver, quiet, or continue the possession, followed up by a writ of assistance. Injunctions of this sort are older than the time of Lord Bacon, since, in his Ordinances, they are treated as a well known process. Indeed, they have been distinctly traced back to the reign of Elizabeth and Edward the Sixth, and even of Henry the Eighth. In some respects they bear an analogy to sequestrations; but the latter process, at least since the reign of James the First,

has been applied, not merely to the lands in controversy in the cause, but also to other lands of the party." 2 Story's Eq., § 959.

<sup>19</sup> Boinay v. Coats, 17 Mich., 411.

<sup>20</sup> Tomlinson v. Rubio, 16 Cal., 202.

<sup>21</sup> Schlecht's Appeal, 60 Pa. St., 172; Pfeltz v. Pfeltz, 14 Md., 376; Tomlinson v. Rubio, 16 Cal., 202; Tevis v. Ellis, 25 Cal., 515.

<sup>22</sup> Schlecht's Appeal, 60 Pa. St., 172.

of the premises.<sup>23</sup> And one who is in possession of real estate can not enjoin another not in possession from bringing a threatened action at law to obtain such possession, even though it be alleged that defendant has no title or right of possession in the property, since full redress may be had in defense of such threatened action at law when instituted.<sup>24</sup>

§ 361. **Fraudulent purchase at sheriff's sale.** As we have already seen, he who seeks the aid of equity for protection in the possession and enjoyment of real property must make a clear and satisfactory showing of his right in order to entitle himself to protection by injunction. But where the *gravamen* of the case is that defendant has fraudulently purchased complainant's real estate at a sheriff's sale for a merely nominal consideration, it is a sufficient compliance with the rule if complainant states his right or interest in such manner as to authorize him to complain of the fraud and to obtain relief against it.<sup>25</sup>

§ 362. **Equity will not correct errors at law; heirs at law and devisee.** An injunction will never be granted for the mere purpose of correcting irregularities and mistakes in proceedings at law which may be remedied in the ordinary tribunals. And where the heirs at law have brought suit to recover possession of real estate, equity will not enjoin their proceedings at the instance of a devisee under a lost will which has been insufficiently proven. The proper remedy in such a case is for the devisee to retrace his steps and to correct his errors in the probate court where they were made, since equity will not sit in review of the errors and irregularities of other tribunals.<sup>26</sup>

§ 363. **Effect of long and peaceable possession.** Quiet and uninterrupted possession of land for a long period of years

<sup>23</sup> Pfeltz v. Pfeltz, 14 Md., 376.

<sup>24</sup> Earle's Admr'x v. Hale's Adm'r, 31 Ark., 473.

<sup>25</sup> Outcalt v. Disborough, 2 Green Ch., 214. But the injunction in

this case was dissolved on the ground that the answer fully denied the equity of the bill.

<sup>26</sup> Clarke v. Clarke, 7 R. L., 45.

constitutes strong ground for the interference of equity to protect the owner in the possession and enjoyment of his property against unauthorized disturbance and interruption without due process of law. And where one has been in the peaceable and uninterrupted enjoyment of his premises for more than twenty years, and a municipal corporation, under pretense that his improvements encroach upon a public highway, enters upon or disturbs the owner in such possession, an injunction may be awarded until the corporation shall have established its right to the land in question by due course of law.<sup>27</sup> So where property has been in the possession and under the management of defendant for a long series of years, equity will be reluctant to interfere with such possession by the appointment of a receiver and the granting of an injunction *in limine*.<sup>28</sup> And when plaintiff's title and right to possession have been established at law after a long series of vexatious litigations, but defendant still asserts title, interferes with plaintiff's title and possession, continues to make leases and sales of portions of the property and commits waste, a proper case is presented for relief by injunction.<sup>29</sup> So when defendant's interest in land has been sold under foreclosure, and the purchaser has received a writ of assistance, but defendant has again taken possession after service of such writ, he may be restrained from continuing to occupy the premises.<sup>30</sup>

<sup>27</sup> *Varick v. New York*, 4 Johns. Ch., 53; *Manchester Cotton Mills v. Town of Manchester*, 25 Grat., 825. The grounds upon which the jurisdiction rests in such cases are laid down by the chancellor in *Varick v. New York*, 4 Johns. Ch., 53, as follows: "The principle upon which the injunction so modified is to be upheld is, that after a claim of right accompanied with actual and constant possession for twenty-five years and upwards, the corporation of

New York can not be permitted without due process of law to enter upon the possession of the plaintiff, and pull down buildings, fences, etc., under their right to regulate highways." See also *Manko v. Borough of Chambersburgh*, 10 C. E. Green, 168.

<sup>28</sup> *Skinner's Company v. Irish Society*, 1 Myl. & Cr., 162.

<sup>29</sup> *Caro v. Pensacola City Co.*, 19 Fla., 766.

<sup>30</sup> *Ten Eyck v. Sjoburg*, 68 Iowa, 625, 27 N. W., 785.

§ 364. **Fraudulent conduct by defendant.** Fraudulent conduct upon the part of the defendant whom it is sought to enjoin has also been recognized as an additional ground for equitable relief by injunction in cases affecting the title to or possession of real property. Thus, where complainant by his bill alleges ownership and title in himself to the premises in controversy, and that defendant, the former owner, has by fraud obtained the title deeds and muniments of title and has instituted proceedings to recover possession of the premises, a proper case for an injunction is presented.<sup>31</sup> And where a father had made a deed conveying real estate to his daughter, with the understanding that it should take effect upon his death, and that he should remain in possession during his life-time, an injunction was allowed to prevent the taking of possession under the deed, or disturbing the father in his possession during his life-time.<sup>32</sup>

§ 365. **Tender of purchase money at illegal sale; injunction of state court to prevent possession under sale under judgment in United States court.** Where the relief is sought for the purpose of preventing the disturbance of complainant in his possession of real estate by a purchaser under an illegal sale made under judicial process, it is not necessary that complainant should first tender to the purchaser the amount of his purchase money as a condition to obtaining relief.<sup>33</sup> It is, however, exceedingly questionable whether an injunction from a state court can be allowed to have the effect of preventing a purchaser of lands at a sale under a judgment of a United States court from receiving possession at the hands of the United States marshal, the bill being filed by one claiming title to the premises as against the defendant in the judgment under which the sale was had.<sup>34</sup>

<sup>31</sup> *Worthy v. Tate*, 44 Ga., 152.

<sup>34</sup> *Paramore v. Persons*, 57 Ga.,

<sup>32</sup> *Alsop v. Eckles*, 81 Ill., 424. 473.

<sup>33</sup> *Drouet v. Lacroix*, 28 La. An.,

§ 366. **When defendant not enjoined from leasing.** When defendant is in possession of the property in controversy, under a claim of right or title as against complainant, who also asserts title, but there is no privity of estate between the parties, defendant will not be enjoined from leasing the premises upon the ground of preventing a cloud upon title.<sup>35</sup>

§ 366 *a*. **Receiver's possession protected by injunction.** A receiver who is appointed to take charge of real estate, pending a litigation as to the title, is entitled to an injunction to protect his possession. And he may, in such case, enjoin an attempt to distraint for rent when the matter may be heard and determined in the suit in which he was appointed receiver.<sup>36</sup>

<sup>35</sup> *Spofford v. Bangor & B. R. Co.*, 66 Me., 51. As to the right of a claimant under the pre-emption laws of the United States to be protected by injunction from being dispossessed of the land claimed, see *Colwell v. Smith*, 1 Wash. Ty. N. S., 92.

<sup>36</sup> *Marshall v. Lockett*, 76 Ga., 289.



### III. JUDICIAL SALES UNDER EXECUTION AGAINST THIRD PERSON.

§ 367. Want of title in judgment debtor not usually ground for injunction.

368. Questions of title should be tried at law.

369. Distinction between legal and equitable title.

370. Distinction between sales of personalty and realty.

371. Relief allowed against sales of trust property.

§ 367. **Want of title in judgment debtor not usually ground for injunction.** It not infrequently happens that sales of real estate are attempted under judicial process against one who has no title to the property levied upon. While the cases upon this subject are far from reconcilable, the clear weight of authority is in support of the proposition that, in the absence of fraud or gross injustice and irremediable injury, courts of equity will not entertain jurisdiction in restraint of judicial sales of real estate under executions against third parties having no title to the property sold. The rule as thus stated is but a corollary of the proposition that equity will not grant relief where ample redress may be had at law, and the injuries resulting from a sale of one's property under execution being generally remediable in courts of law, such sales will not usually be enjoined.<sup>1</sup> Thus, a sale of lands under exe-

<sup>1</sup> *Hall v. Davis*, 5 J. J. Marsh., 290; *Watkins v. Logan*, 3 Monr., 21; *Bouldin v. Alexander*, 7 Monr., 425; *Coughron v. Swift*, 18 Ill., 414; *Freeman v. Elmendorf*, 3 Halst. Ch., 475, affirmed on appeal to the Court of Errors, *ib.*, 655; *Henderson v. Morrill*, 12 Tex., 1; *Carlin v. Hudson*, *ib.*, 202; *Wilson v. Hyatt*, 4 S. C., 369; *Whitman v. Willis*, 51 Tex., 421; *Same v. Same*, *ib.*, 429; *American D. & I. Co. v. Trustees*, 35 N. J. Eq., 181; *Gatewood v. Burns*, 99 N. C., 357, 6 S. E., 635; *Bostic v. Young*, 116 N. C., 766, 21 S. E., 552. See also *Shalley v. Spillman*, 19 Fla., 500. But see, *contra*, *Brummel v. Hurt*, 3 J. J. Marsh., 709; *Downing v. Mann*, 43 Ala., 266; *McCulloch v. Hollingsworth*, 27 Ind., 115; *Bach v. Goodrich*, 9 Rob. (La.), 391; *Budd v. Long*, 13 Fla., 288; *Scobey v. Walker*, 114 Ind., 254, 15 N. E., 674; *Wilhelm v. Woodcock*, 11 Ore., 518; *Bishop v. Moorman*,

cution will not be enjoined at the instance of a third person claiming title who alleges no fraud and does not show that his rights will be prejudiced or that gross or irreparable mischief will result from allowing the sale to proceed.<sup>2</sup>

§ 368. **Questions of title should be tried at law.** In support of the rule as above laid down it is to be observed that questions of title are properly triable in a legal rather than an equitable forum, and no departure from the rule will be allowed except in cases of fraud or irreparable injury.<sup>3</sup> And where a sheriff upon an execution against a judgment debtor is proceeding to sell real estate, the title to which is in dispute and which is claimed by another person, a court of equity will not enjoin, there being no special equities requiring a departure from the rule of leaving the parties to their remedy at law.<sup>4</sup> Even where fraud is relied upon as the foundation for the relief the party complaining must show a definite injury to himself as the result of the fraud. And the purchaser of lands is not entitled to restrain their sale under a judgment obtained by fraud against his grantor without showing affirmatively that he will be injured by such sale.<sup>5</sup>

§ 369. **Distinction between legal and equitable title.** In the application of the rule a distinction has been drawn between cases where the parties aggrieved possess the legal, and where

98 Ind., 1. In *Bach v. Goodrich*, 9 Rob. (La.), 391, and *McCulloch v. Hollingsworth*, 27 Ind., 115, the doctrine is laid down that the obligation of a grantor of real estate with covenants of warranty to defend the title of his grantee, constitutes such an interest as to make him a proper party to enjoin a sale of real estate to satisfy an execution against a third person. And in *Budd v. Long*, 13 Fla., 288, it is held that an injunction is the appropriate remedy in the class of cases under consideration, because

the sale would operate as a cloud upon the owner's title and would affect the value of his property in a manner not susceptible of measurement or redress in an action at law.

<sup>2</sup> *Henderson v. Morrill*, 12 Tex., 1; *Carlin v. Hudson*, Ib., 202.

<sup>3</sup> *Freeman v. Elmendorf*, 3 Halst. Ch., 475, affirmed on appeal, Ib., 655; *Wilson v. Hyatt*, 4 S. C., 369.

<sup>4</sup> *Freeman v. Elmendorf*, 3 Halst. Ch., 475, affirmed on appeal, Ib., 655.

<sup>5</sup> *Marriner v. Smith*, 27 Cal., 649.

they possess the equitable title to the property about to be sold. The distinction is based upon the fact that in the case of legal ownership the remedy at law is ample, but where the title which it is sought to protect is merely an equitable title the courts of law can not give adequate redress; hence equity will entertain jurisdiction to grant relief against the sale in behalf of complainants having only an equitable title to the premises.<sup>6</sup> Thus, plaintiff having an equitable title by payment of purchase money and taking possession, but not yet having acquired the legal title by conveyance, may enjoin a sale of the premises under a subsequent judgment against his vendor.<sup>7</sup>

### § 370. Distinction between sales of personalty and realty.

It may, at first sight, appear difficult to reconcile the general doctrine as here discussed and illustrated, denying relief by injunction against the sale of one's real estate under execution against a third person, with the rule as previously stated, permitting such relief for the prevention of the sale of one's personal property under execution against another.<sup>8</sup> And, indeed, the authorities in support of the divergent rules thus established in the two classes of cases are not wholly reconcilable. It is to be noticed, however, that the courts in granting preventive relief against the sale of personal property under execution against a third person rest their decisions largely upon the uncertainty and insufficiency of the legal remedy for damages in such cases, as well as upon the necessity of extending the relief for the retention and preservation of the property in specie.<sup>9</sup> While in cases of the sale of real property

<sup>6</sup> *Orr v. Orr*, 3 J. J. Marsh., 269.

<sup>7</sup> *Parks v. People's Bank*, 97 Mo., 130, 11 S. W., 41.

<sup>8</sup> See the question discussed as to sales of personalty, chapter III, *ante*, § 119 *et seq.*

<sup>9</sup> See *Wilson v. Butler*, 3 Munf., 559; *Watson v. Sutherland*, 5 Wal.,

74; *Hardy v. Broadus*, 35 Tex., 668; *McCreery v. Sutherland*, 23 Md., 471; *Chappell v. Cox*, 18 Md., 513; *Amis v. Myers*, 16 How., 492; *Poincy v. Burke*, 28 La. An., 673; *Lewis v. Daniels*, 23 La. An., 170; *Denville v. Hayes*, 23 La. An., 550; *Walker v. Hunt*, 2 West Va 491;

the possession is not ordinarily divested by a sale under execution, and the purchaser is left to the ordinary remedies for obtaining such possession. And the question of title to realty being matter of record, full redress may usually be had at law in resisting an action by the purchaser to obtain possession after a sale of real property under an execution against a third person having no title to such property.<sup>10</sup>

§ 371. **Relief allowed against sales of trust property.** In cases where the property is affected by a trust the tendency of the courts is toward a departure from the rule of non-interference as above stated, and to allow relief by injunction to prevent a sale of the trust estate. And equity may properly enjoin a sale under execution of property held by the judgment debtor in trust for a third person, and which has passed by transfer from the trustee to the beneficiary and from him to plaintiff by purchase.<sup>11</sup> So where a mother holds real property in trust for herself and her minor children, and a levy is made upon the property under a judgment against the mother alone, it is proper to enjoin a sale under the execution until the interest of the various *cestius que trustent* may be established in the premises.<sup>12</sup> So, too, where real estate is held in trust for a married woman and her children, and judgment is obtained against the trustees for alleged advances to one of the *cestius que trustent*, the judgment being general and not specifying the property to be bound for its payment, equity may enjoin a levy of the execution upon the trust estate.<sup>13</sup> And the sale of a leasehold interest in realty, under a judgment against the lessee, may be enjoined by the owner of the fee when the lessee holds title as a naked trustee, having no beneficial interest, and this fact being known to the judgment

McFarland v. Dilly, 5 West Va., 135; Baker v. Rinehard, 11 West Va., 238; Ford v. Rigby, 10 Cal., 449.

<sup>11</sup> Hollingsworth v. Trueblood, 59 Ind., 542.

<sup>12</sup> Simms v. Phillips, 51 Ga., 433.

<sup>13</sup> Clinch v. Ferril, 48 Ga., 365.

<sup>10</sup> See Southerland v. Harper, 83 N. C., 200.

creditor.<sup>14</sup> So if the vendor of real estate retains the legal title as security for notes given for the unpaid purchase money, his sale of such notes is regarded as transferring the lien or security of the purchaser, and the interest or title of the vendor in the real estate is thereafter merely that of a trustee under a naked trust. And if, under such circumstances, judgment is recovered against the vendor after his sale of the property, a levy under execution upon such real estate may be enjoined upon the application of the purchaser, he having received possession under his contract of purchase and having ever since remained in possession.<sup>15</sup>

<sup>14</sup> *South Presbyterian Church v. Hintze*, 72 Mo., 363.

<sup>15</sup> *Jackson v. Snell*, 34 Ind., 241.



## IV. CLOUD UPON TITLE.

- § 372. Foundation of the jurisdiction.
- 373. Test to be applied.
- 374. Judgment already satisfied.
- 375. Distinction as to whether defect does or does not appear of record.
- 376. Records of United States land office considered as foreign.
- 377. Remedy at law bars injunction; general illustrations of the jurisdiction.
- 378. Negligence in examining title a bar to relief.
- 379. Sale of lands under execution against former owner enjoined.
- 380. Administrator denied relief; jurisdiction cautiously exercised against strangers.
- 381. Administrator's sale, when enjoined.

§ 372. **Foundation of the jurisdiction.** The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity, recognized by all the authorities, and founded upon the clearest principles of right and justice. The jurisdiction by injunction to prevent a cloud upon title is closely analogous to the well settled jurisdiction of courts of chancery for the removal of cloud upon title; and the reasoning which supports the jurisdiction in the latter case would seem to apply with equal if not greater force in the former. It seems, therefore, to follow as a necessary consequence that if the aid of equity may be invoked to remove a cloud upon title to realty, it may with equal propriety be exerted to enjoin such illegal acts as will necessarily result in a clouded title.<sup>1</sup> And it may

<sup>1</sup> *Pettit v. Shepherd*, 5 Paige, 28, 61 N. W., 77; *Kirwin v. Murphy*, 28 C. C. A., 348, 83 Fed., 275. *Christie v. Hale*, 46 Ill., 117; *A* contrary doctrine was affirmed *Merriman v. Polk*, 5 Heisk., 717; *Irwin v. Lewis*, 50 Miss., 363; *in Armstrong v. Sanford*, 7 Minn., 49; *Montgomery v. McEwen*, 9 Minn., 103; but these cases seem to have been overruled in *Conkey v. Dike*, 17 Minn., 457. As to the jurisdiction of equity to grant a *Beaser v. City of Ashland*, 89 Wis., perpetual injunction for the pur-

be asserted as a general proposition, that a sale of lands under execution, which would confer no title upon the purchaser, and whose only effect would be to cloud the title of others, will be enjoined.<sup>2</sup>

§ 373. **Test to be applied.** It is difficult to establish any exact test which will be applicable in all cases to determine what constitutes such a cloud upon title as to authorize a court of equity to interfere for its prevention. It has been held, however, that if the sale or conveyance which it is sought to restrain is such that in an action of ejectment brought thereunder the real owner of the property would be obliged to offer evidence to defeat a recovery, then such a cloud would be raised as to warrant the interference of equity.<sup>3</sup> Upon the other hand, if under the levy and sale a purchaser would not acquire even an apparent title to the premises, the execution being against one who had no title, so that the purchaser in an action of ejectment could not recover even upon his own

pose of quieting a title which has been fully established, see *Wickliffe v. Owings*, 17 How., 47. And see, *ante*, § 248.

<sup>2</sup> *Bank of U. S. v. Schultz*, 2 Ohio, 471; *Norton v. Beaver*, 5 Ohio, 178; *Christie v. Hale*, 46 Ill., 117; *Bennett v. McFadden*, 61 Ill., 334; *Sharpe v. Tatnall*, 5 Del. Ch., 302; *Vogler v. Montgomery*, 54 Mo., 577; *Uhl v. May*, 5 Neb., 157; *Key C. G. L. Co. v. Munsell*, 19 Iowa, 305; *Pixley v. Huggins*, 15 Cal., 127; *Porter v. Pico*, 55 Cal., 165; *Roth v. Insley*, 86 Cal., 134, 24 Pac., 853; *Chase v. City Treasurer*, 122 Cal., 540, 55 Pac., 414; *White v. Espey*, 21 Ore., 328, 28 Pac., 71; *Dietz v. City of Neenah*, 91 Wis., 422, 64 N. W., 299, 65 N. W., 500; *McConnaughy v. Penoyer*, 43 Fed., 339. And see *Pettit v. Shepherd*, 5 Paige, 493; *Oak-*

*ley v. Trustees*, 6 Paige, 262. It is not necessary that the sale should divest complainant of his title to warrant equity in interfering; it is sufficient that it simply operates to cloud his title. And the fact that the levy was only made upon the "right, title and interest" of complainant in the injunction suit will not avail against granting the injunction. *Key C. G. L. Co. v. Munsell*, 19 Iowa, 305. And a court of equity, in removing a cloud upon title to real estate, may enjoin the defendant from setting up or asserting his claim in the future. *Craft v. I. D. & W. R. Co.*, 166 Ill., 580, 46 N. E., 1132.

<sup>3</sup> *Pixley v. Huggins*, 15 Cal., 127; *Lick v. Ray*, 43 Cal., 83; *Roth v. Insley*, 86 Cal., 134, 24 Pac., 853; *Chase v. City Treasurer*, 122 Cal., 540, 55 Pac., 414; *Rea v. Long-*

showing, and defendant in ejectment would not be put to proof to defeat the action, an injunction will not lie.<sup>4</sup>

§ 374. **Judgment already satisfied.** An attempt to enforce a judgment already satisfied may sometimes cast such a cloud upon the title of the judgment debtor as to warrant equity in interfering for the protection of other creditors whose claims are established by judgment. Thus, where a prior judgment creditor has received full payment and satisfaction of his judgments, but still keeps them on foot and attempts to enforce executions thereunder to the prejudice of a junior creditor, he thereby casts such a cloud upon the title to the debtor's estate as to lay the foundation for an injunction in behalf of the junior creditor.<sup>5</sup> So the owner of land may enjoin its sale under execution against his grantor upon a judgment which was satisfied before complainant purchased the premises.<sup>6</sup>

§ 375. **Distinction as to whether defect does or does not appear of record.** In the exercise of the jurisdiction for the prevention of cloud upon title, a distinction is drawn between cases where the invalidity or illegality charged as the cloud is shown by evidence *dehors* the record, and where it appears upon the face of the proceedings themselves. And while in the former case the relief is freely granted, in the latter courts of equity will not interpose.<sup>7</sup> Thus, where a question concerning the partition of lands has been referred to arbitration, if the award for the partition is invalid upon its face, no such cloud will result as to warrant equity in enjoining the proceedings.<sup>8</sup> So where an execution is abso-

street, 54 Ala., 291; *Gregg v. Sanford*, 12 C. C. A., 525, 65 Fed., 151; *McConaughy v. Pennoyer*, 43 Fed., 339.

<sup>4</sup> *Shalley v. Spillman*, 19 Fla., 500; *Archbishop of San Francisco v. Shipman*, 69 Cal., 586, 11 Pac., 343.

<sup>5</sup> *Shaw v. Dwight*, 16 Barb., 536.

<sup>6</sup> *Whitehill v. Fauber*, 97 Ind., 169.

<sup>7</sup> *Meloy v. Dougherty*, 16 Wis., 269; *Hanson v. Johnson*, 20 Minn., 194; *Browning v. Lavender*, 104 N. C., 69, 10 S. E., 77.

<sup>8</sup> *Meloy v. Dougherty*, 16 Wis., 269.

lutely void, as appears upon the face of the record, a sale thereunder does not constitute such a cloud upon the title as to warrant an injunction.<sup>9</sup> So the sale of real estate under a judgment for a delinquent special assessment will not be enjoined as casting a cloud upon title upon the ground that the judgment of confirmation was not properly entitled, since such defect fully appears of record upon the face of the proceedings.<sup>10</sup> And to justify the relief in this class of cases, it is held that the title of the party complaining being shown as it appears of record, the cloud to be removed must be apparently a good title as against that of complainant, though really defective by reason of something not appearing of record. Where, therefore, the cloud which it is sought to remove can only be shown to be a good title by leaving that of complainant out of the question, an injunction will be refused.<sup>11</sup> Nor will a sale of real estate under execution be enjoined upon the ground that the property is not subject to execution.<sup>12</sup> And an injunction will not lie to prevent a sale of land under execution at the suit of one who has no further interest in the premises.<sup>13</sup> But the owner of real estate may enjoin the recording of an instrument which is not entitled to record and which would cast a cloud upon his title.<sup>14</sup>

§ 376. **Records of United States land office considered as foreign.** But while the general proposition is unquestioned that equity will not interfere to prevent a cloud upon title when the invalidity or illegality relied on appears of record, and so can not deceive or mislead,<sup>15</sup> the records within the

<sup>9</sup> *Hanson v. Johnson*, 20 Minn., 194.

<sup>10</sup> *Craft v. Kochersperger*, 173 Ill., 617, 50 N. E., 1061.

<sup>11</sup> *Moore v. Cord*, 14 Wis., 213; *Gamble v. Loop*, 14 Wis., 465. See also *Lehman v. Roberts*, 86 N. Y., 232.

<sup>12</sup> *Bristol v. Hallyburton*, 93 N. C., 384.

<sup>13</sup> *Small v. Somerville*, 58 Iowa, 362, 12 N. W., 315.

<sup>14</sup> *Walter v. Hartwig*, 106 Ind., 123, 6 N. E., 5.

<sup>15</sup> *Heussler v. Thomas*, 4 Mo. App., 463.

meaning of the rule are the public records of the county or state within which the lands are situated, and of which purchasers are bound to take notice, and the records of a United States land office are treated as foreign records within the meaning of the rule. Although, therefore, the invalidity relied upon appears of record in a United States land office, but not of record in the county where the land is situated, and the lien or interest claimed by defendant is apparently good as against plaintiffs' title and hence constitutes a cloud upon their title, an injunction may be allowed.<sup>16</sup>

§ 377. **Remedy at law bars injunction; general illustrations of the jurisdiction.** Since the interference for the prevention of a cloud upon title grows out of the inadequacy of the remedy at law, it follows that where special legal remedies are provided sufficiently efficacious to meet the exigencies of the case and to prevent the injury complained of, no injunction will be allowed, and the parties will be left to pursue the remedy provided at law. Thus, a sheriff's sale of real estate under execution will not be enjoined on the ground that it would pass no title and might impair the rights of the real owner by clouding his title, where under the peculiar judicial system of the state ample remedy may be had at law.<sup>17</sup> And

<sup>16</sup> *Gile v. Hallock*, 33 Wis., 523.

<sup>17</sup> *Drake v. Jones*, 27 Mo., 428; *Kuhn v. McNeil*, 47 Mo., 389; *Archbishop of San Francisco v. Shipman*, 69 Cal., 586, 11 Pac., 343. *Drake v. Jones*, 27 Mo., 428, was an application for an injunction to restrain a sheriff's sale of real estate under an execution on the ground that it would pass no title and might impair the rights of the real owner by clouding his title. The relief was denied, the court, Richardson, J., saying: "If the effects of a sale under the defendant's execution, whilst it passed

no interest, would cast a hurtful doubt on the plaintiff's title, which he could only remove by evidence *in pais*, and the purchaser could stand by indefinitely and refuse to litigate his right until the evidence to repel it might be lost and the plaintiff less able to contest it, and in the meantime the true owner be unable to sell and afraid to improve, and thus be denied the full dominion over his property, then the exercise of the power of the court by the writ of injunction would be properly invoked as a means of



where a bill is filed against a party in possession of lands under tax deeds to have such deeds declared void as a cloud upon the title, and praying an injunction to restrain the commission of waste, complainant not being in possession, and not having established his title to the premises at law, and showing no privity of estate and no action of ejectment pending to try the title, the bill will be dismissed for want of equity.<sup>18</sup> A *bona fide* purchaser of real estate for a valuable consideration may restrain a sale of the property under execution when he has purchased after the rendition of the judgment but before the execution was delivered to the sheriff, the judgment not being a lien upon the property, since such sale would operate as a cloud upon his title.<sup>19</sup> And a subsequent *bona fide* purchaser may enjoin a sale of realty under a judgment, when the lien created by statute in favor of the judgment creditor has expired by lapse of time without a sale being had.<sup>20</sup> And where judgment creditors have stipulated in writing that they will not enforce their lien against certain real estate of the defendant, it has been held that subsequent attempts to enforce the lien against the property in violation of the agreement might be enjoined.<sup>21</sup> But one who

preventing injury and of precautionary justice. But our law has disarmed a person having no title of the power by false clamor to injure the title of another in that way. In the first place provision is made with minute particularity for perpetuating testimony; and then again, if the plaintiff is out of possession he may immediately bring his ejectment; but if he is in possession, and wishes to silence an adverse claimant, he may file a petition and compel him to bring an action to try the title, or be forever barred from claiming any right or title adverse to the petitioner. (R. C. 1855, p. 1241,

§ 62.) \* \* \* Several of the authorities cited from other states, as to the power to enjoin in cases like the present one, seem to be in point; but our system is different from theirs, and we think that sound policy requires us to deny the relief the plaintiff seeks in the form and at the time it was asked." And a similar doctrine was held in *Kuhn v. McNeil*, 47 Mo., 339.

<sup>18</sup> *Blackwood v. Van Vleet*, 11 Mich., 252.

<sup>19</sup> *Martin v. Hewitt*, 44 Ala., 418.

<sup>20</sup> *Riggin v. Mulligan*, 4 Gilm., 50.

<sup>21</sup> *Reily v. Miami Co.*, 5 Ohio, 333.

holds a prior lien upon real estate will not be allowed to enjoin a subsequent judgment creditor from enforcing his judgment by execution, since a sale under such execution would not impair or defeat the prior lien, but would leave it at law and in equity as if such sale had never taken place.<sup>22</sup> Where land has been improperly assessed for benefits arising from the opening of streets, the commissioners having proceeded irregularly and illegally in condemning the property, a court of equity may interpose by injunction for the purpose of preventing a cloud upon title, such a case being properly distinguishable from a sale of personal property where ample remedy may be had at law.<sup>23</sup> But an injunction will not be granted to restrain the issuing of a patent for lands where such patent can not by any possibility cast a cloud upon complainant's title, the lands in question being tide lands and not patentable, although the patent if issued would be invalid and would require evidence *dehors* the record to establish its invalidity.<sup>24</sup>

§ 378. **Negligence in examining title a bar to relief.** Notwithstanding the somewhat liberal tendency of courts of equity to the exercise of their extraordinary jurisdiction for the prevention of a cloud upon title, the relief will not be extended in behalf of one whose own carelessness or want of diligence in the examination of the title before purchasing has prevented his acquiring knowledge of liens which he afterwards seeks to remove. Equity will not, therefore, enjoin a sale of real estate under execution upon a judgment at law, upon the ground that complainant had purchased the property and made valuable improvements thereon before discovering that it was subject to the lien of the judgment in question, it being a sufficient ground for withholding relief in such case that equity will not assist one whose condition is attributable to his failure to exercise reasonable diligence.<sup>25</sup>

<sup>22</sup> *Union Bank v. Poultney*, 8 Gill & J., 324.

<sup>24</sup> *Taylor v. Underhill*, 40 Cal. 471.

<sup>23</sup> *Leslie v. St. Louis*, 47 Mo., 474.

<sup>25</sup> *Dillett v. Kemble*, 10 C. E.

§ 379. **Sale of lands under execution against former owner enjoined.** A vendee of lands who is in possession under a bond for title and who claims the legal title may enjoin a judgment creditor of his vendor from selling the lands under execution against the vendor, the bond having been recorded before the judgment, the relief being granted in such case upon the principle of *quia timet*, since equity will not compel the vendee to wait until such threatened sale is completed and then to rely upon the strength of his title in a proceeding at law.<sup>26</sup> And since possession of real property is considered as notice of the title and interest of the possessor, it is held that where one purchases land and is in its exclusive possession, but has not yet received a conveyance from his grantor in whom the legal title yet stands, he may restrain a sale of the land under execution against his vendor.<sup>27</sup> So a purchaser by parol, who has paid the purchase money and been in possession until his title has matured by prescription, has been allowed to enjoin a sale under execution upon a judgment recovered against his vendor after such sale and possession.<sup>28</sup> And one who purchases and takes possession of real estate, but whose conveyance is not recorded until after the execution of a deed of trust by his grantor of the same premises, may enjoin a sale under such deed, the trustee and beneficiary having full knowledge of the prior conveyance and possession.<sup>29</sup> But a plaintiff in possession and asserting a legal title to real estate has been refused an injunction to prevent its sale under a judgment recovered against the grantor subsequent to his conveyance to plaintiff.<sup>30</sup> And a

Green, 66. But see S. C., 8 C. E. Green, 58, where, upon the facts shown, the case was regarded as a proper one to continue the interlocutory injunction until the final hearing.

<sup>26</sup> *Merriman v. Polk*, 5 Heisk., 717. But in *Moore v. Hallum*, 1 Lea, 511, relief was refused when

the bond under which plaintiff claimed title had not been recorded.

<sup>27</sup> *Uhl v. May*, 5 Neb., 157.

<sup>28</sup> *Niles v. Davis*, 60 Miss., 750.

<sup>29</sup> *Martin v. Jones*, 72 Mo., 23.

<sup>30</sup> *Sheldon v. Stokes*, 34 N. J. Eq., 87.

purchaser can not enjoin the execution of a sheriff's deed upon a sale under a judgment recovered before his purchase, to which judgment he was not a party.<sup>31</sup> But an equitable lien or charge upon real estate, which is prior to the lien of a judgment upon the same premises, may be protected by injunction against a sale of the property under execution until the rights of all parties may be determined.<sup>32</sup> And the purchaser of a portion of a tract of land, which is subject to the lien of a judgment against his grantor, may restrain a sale under execution of such portion until the remainder of the land owned by the grantor and which is sufficient to satisfy the execution is first sold.<sup>33</sup> So a sale of lands under a judgment against a former owner which was never a lien upon the premises may be restrained, since the sheriff's certificate of such sale, or the conveyance thereunder, would constitute a cloud upon the owner's title.<sup>34</sup> And a *bona fide* purchaser for value of real property may enjoin a sheriff's sale of the premises under an attachment issued subsequent to his purchase and without his knowledge at that time.<sup>35</sup> And a wife in possession of real estate under a conveyance from her husband may enjoin a sale of such land under execution issued upon a judgment rendered against the husband.<sup>36</sup>

§ 380. **Administrator denied relief; jurisdiction cautiously exercised against strangers.** While the jurisdiction of equity to enjoin a sale which is likely to result in clouding plaintiff's title is thus shown to be well established, to bring a case within the rule the party aggrieved must actually have a title which is embarrassed or about to become so by the threatened cloud.<sup>37</sup> And when the plaintiff fails to show any title, but

<sup>31</sup> Colby v. Brown, 10 Neb., 413, 436. See also Wilhelm v. Woodcock, 11 Ore., 518, 5 Pac., 202.

<sup>32</sup> Monticello Hydraulic Co. v. Loughry, 72 Ind., 562. <sup>35</sup> Groves v. Webber, 72 Ill., 606.

<sup>33</sup> Edwards v. Applegate, 70 Ind., 69 Pac., 616. <sup>36</sup> Einstein v. Bank, 137 Cal., 47,

325. <sup>37</sup> Robinson v. Joplin, 54 Ala., 70;

<sup>34</sup> Goodell v. Blumer, 41 Wis., Benner v. Kendall, 21 Fla., 584.

at the most only a right to sell the lands for purposes of administration, plaintiff being an administrator in charge of the estate to which the lands pertain, equity will not interfere.<sup>38</sup> And the courts are also cautious in granting the relief where it would work an injury to strangers.<sup>39</sup>

§ 381. **Administrator's sale, when enjoined.** When an administrator is about to sell real estate as that of his intestate, which had been sold by the latter in his life-time, he may be enjoined from selling upon the ground of preventing a cloud upon title, the relief being extended upon the principle of *quia timet*.<sup>40</sup>

<sup>38</sup> Robinson v. Joplin, 54 Ala., 70

<sup>40</sup> Gerry v. Stimson, 60 Me., 186.

<sup>39</sup> Goldstein v. Kelly, 51 Cal., 301.



## V. COLLECTION OF PURCHASE MONEY ON FAILURE OF TITLE.

- § 382. Unsettled state of authorities.
383. Vendor's fraud ground for relief; effect of laches.
384. Purchaser in possession with warranty not allowed to enjoin collection of purchase money.
385. Defense should be urged in suit for purchase money.
386. Knowledge of defect in title by vendor.
387. Injunction allowed when possession not given to purchaser.
388. Outstanding incumbrances; covenants of quiet enjoyment.
389. Pendency of action of ejectment.
390. Injunction allowed when no conveyance given.
391. Recovery barred by statute of limitations.
392. Sales of hazard.
393. Covenant not to withhold payment for want of conveyance.
394. False representations of vendor as to quantity; same as to use of water.
395. Conflicting decisions.
396. Cases where injunction allowed because of defective title.
397. Entire failure or want of title.
398. The doctrine in Indiana.
399. Effect of garnishee proceedings against purchaser.
400. Vendor's insolvency ground for relief.
401. Judicial sales.
402. Violation of vendor's agreement.
403. Vendor's failure to procure outstanding title.
404. Injunction allowed when legal remedy inoperative.
405. Duty of vendor seeking dissolution.
406. Injunction rarely perpetuated.
407. Purchaser with knowledge of defect can not enjoin.
408. Rescission of contract by purchaser.
409. Effect of special stipulations as to payment.
410. Difficulty in obtaining title resulting from purchaser's own negligence.
411. Set-off; recoupment; unpaid taxes.
412. Diligence required in remedy at law.
413. Damages on dissolution.

§ 382. **Unsettled state of authorities.** Upon no branch of the jurisdiction of equity by injunction, save that in restraint of taxation, are the authorities more divergent and irreconcilable than in cases where the relief has been invoked to

restrain the collection of unpaid purchase money of real estate because of failure of title. While, upon the one hand, courts of the highest authority have denied the relief in cases where the grounds relied upon might have been urged in defense of an action at law for the purchase money, and in cases where the parties complaining were in possession under covenants of warranty have held the proper remedy to be at law upon the covenants contained in the deed, courts of equal authority and respectability have, upon the other hand, contended strenuously in similar cases for the exercise of the jurisdiction in equity to restrain the collection of the purchase money. In this unsettled state of the authorities it is exceedingly difficult, if not impossible, by any process of generalization, to deduce from the decided cases principles of general application which shall serve as rules for the guidance of courts and practitioners. The most that can be attempted is to group together the adjudications both for and against the exercise of the jurisdiction, together with the reasoning upon which the decisions are based.

§ 383. **Vendor's fraud ground for relief; effect of laches.**

It will be found upon investigation that many, though by no means all of the decisions in support of the jurisdiction in restraint of the collection of purchase money, rest upon the ground of fraudulent or deceitful conduct upon the part of the vendor. The relation of vendor and vendee of real property being considered a confidential relation, the suppression by the vendor of a knowledge of fatal defects in the title of the property conveyed constitutes such fraud as will authorize the interference of equity to prevent the collection of the purchase money, notwithstanding the remedy at law for breach of covenants of title, if the vendor be insolvent so that a judgment against him would be worthless.<sup>1</sup> Accordingly it has been held where the vendor had disguised from the vendee

<sup>1</sup> *Ingram v. Morgan*, 4 Humph. 66; *mick*, 6 Fla., 368; *Reed v. Tioga* 66. And see *Yonge v. McCor-* *Manufacturing Co.*, 66 Ind., 21.

the fact that his only title was a bond for a conveyance from a person since deceased, that a note for an unpaid balance of purchase money might be enjoined even in the hands of a third person, who, however, had not received it in due course of trade, but had taken it in payment of a pre-existing indebtedness, and without indorsement.<sup>2</sup> So where fraud is practiced by the vendor against the purchaser in concealing from the latter certain tax sales, which are an incumbrance upon the land sold, although the vendee may have lost his right to rescind the contract by reason of his laches after discovering the fraud, he may still be protected by injunction against the collection of the residue of the unpaid purchase money until a good title can be made to the premises.<sup>3</sup> Where, however, the purchaser has been guilty of unreasonable delay and laches in asserting his right to relief upon the ground of fraudulent representations on the part of the vendor, equity will refuse to interfere by injunction with a judgment for purchase money. Thus, when the purchaser takes possession of the land, remains in possession and cultivates it for a long period of years, and permits judgment to be taken against him for part of the unpaid purchase money, he can not, after the lapse of many years, enjoin a sale of the land in satisfaction of the judgment because of deceitful representations by the vendor as to its value and capability of cultivation, being estopped in such case by his own laches from relief in equity.<sup>4</sup>

§ 384. **Purchaser in possession with warranty not allowed to enjoin collection of purchase money.** Where the purchaser of land is in actual possession under covenants of warranty, the better doctrine seems to be that he is not entitled to an injunction against the collection of purchase money on the ground of failure of consideration resulting from want of title.

<sup>2</sup> *Ingram v. Morgan*, 4 Humph., 66. And see *Yonge v. McCormick*, 6 Fla., 368; *Clarke v. Hardgrove*, 7 Grat., 399.

<sup>3</sup> *Houston v. Hurley's Adm'rs*, 2 Del. Ch., 247.

<sup>4</sup> *Hambrick v. Dickey*, 48 Ga., 578.

Possession having been taken under the deed, and there being no eviction at law under a paramount title, the remedy must be had at law upon the covenants in the deed in the absence of fraudulent and wilful misrepresentations as to vendor's title. In such cases eviction at law is regarded as an indispensable part of the purchaser's claim to relief in equity, and he being still in possession under covenants of warranty, no injunction should be allowed.<sup>5</sup> And in no event will mere general allegations of failure of title or of defective title warrant a court of equity in enjoining a judgment for purchase money.<sup>6</sup> So the purchaser, while in undisturbed possession,

<sup>5</sup> *Bumpus v. Platner*, 1 Johns. Ch., 213; *Abbott v. Allen*, 2 Johns. Ch., 519; *Patton v. Taylor*, 7 How., 133; *Gayle v. Fattle*, 14 Md., 69; *Beale v. Seiveley*, 8 Leigh, 658; *Wilkins v. Hogue*, 2 Jones Eq., 479; *Elliott v. Thompson*, 4 Humph., 99; *Senter v. Hill*, 5 Sneed, 505; *Truly v. Wanzer*, 5 How., 141; *Merriman v. Norman*, 9 Heisk., 269; *Harding, Ex'r, v. Commercial Loan Co.*, 84 Ill., 251; *Allen v. Thornton*, 51 Ga., 594; *Swain v. Burnley*, 1 Mo. (2d edition), 286. In *Bumpus v. Platner*, 1 Johns. Ch., 213, an injunction was sought against proceedings under a bond and mortgage given for purchase money, on the ground of failure of consideration, consisting in defective title, the complainant being in undisturbed possession under covenants of warranty. The relief was denied, Kent, Chancellor, saying: "I apprehend it may be safely said that there is no case of relief on this ground, when possession has passed and continued, without any eviction at law, under a paramount title. Platner conveyed to the plaintiffs, with a covenant of warranty, and he is

bound to defend their title at law; and *non constat*, that he is not able and willing to do it. There was a case under Lord Nottingham (2 Ch. Cas., 19, Anon.), in which the purchaser was relieved from the payment of the purchase money; but he had already lost the land, by eviction, under a better title. If the title fails, in this case, the plaintiffs can resort to the covenants in their deeds for their indemnity. I consider an eviction at law an indispensable part of the plaintiff's claim to relief here, on the mere ground of failure of consideration." But see, *contra*, *Clarke v. Hardgrove*, 7 Grat., 399; *Koger v. Kane*, 5 Leigh, 606; *Bartlett v. London*, 7 J. J. Marsh., 641; *Yonge v. McCormick*, 6 Fla., 368; *Gay v. Hancock*, 1 Rand., 72; *Miller v. Argyle's Ex'r*, 5 Leigh, 460; *Bullitt's Ex'rs v. Songster's Adm'rs*, 3 Munf., 55; *Dorsey v. Hobbs*, 10 Md., 412; *Buchanan v. Lorman*, 3 Gill, 51.

<sup>6</sup> *French v. Howard*, 8 Bibb, 301; *Kinports v. Rawson*, 29 West Va., 487, 2 S. E., 85.

can not maintain a bill to enjoin a sale of the lands under a mortgage given to secure the unpaid purchase money upon the ground that he acquired no title by his purchase.<sup>7</sup> Nor is the purchaser of lands, who is in possession, entitled to relief by injunction against the enforcement of judgments for the unpaid purchase money because of judgments against the vendor which may prevent him from making a good title, when only a remote possibility is shown that the purchaser will ever be disturbed in his possession.<sup>8</sup> And to warrant an injunction against the enforcement of a judgment for unpaid purchase money, it is not sufficient to allege a failure of title to the premises conveyed, since that might have been urged in defense of the action in which judgment was recovered for such purchase money, or the purchaser might have a legal remedy upon the covenants for a good title given by the vendor.<sup>9</sup>

§ 385. **Defense should be urged in suit for purchase money.**

It is also held that equity will not interfere by injunction with the enforcement of a decree for unpaid purchase money of real estate, when no equity is alleged as a ground for the desired relief which was not or should not have been urged in the action resulting in such decree.<sup>10</sup> And when the purchaser has an equitable defense to an action for the foreclosure of the notes and mortgage given for the unpaid purchase money, such defense growing out of the fact that the land had been incumbered previous to his purchase, but neglects to avail himself of such defense in that action, he can not upon that ground enjoin the enforcement of the judgment for unpaid purchase money.<sup>11</sup> So when the purchaser relies upon a breach of warranty in defense of an action for the recovery

<sup>7</sup> *Cartright v. Briggs*, 41 Ind., 184.

<sup>8</sup> *Collins v. Clayton*, 53 Ga., 649;  
*Wamsley v. Stalnaker*, 24 West Va. 214.

<sup>9</sup> *Allen v. Thornton*, 51 Ga., 594.

<sup>10</sup> *Moore v. Hill*, 59 Ga., 760.

<sup>11</sup> *Ricker v. Pratt*, 48 Ind., 73.



of purchase money, but is defeated in the action and judgment is recovered against him, he can not enjoin such judgment because of another breach of warranty of which he might by the use of due diligence have availed himself upon the former hearing.<sup>12</sup>

§ 386. **Knowledge of defect in title by vendor.** To warrant equity in relieving a vendee in possession under covenants of warranty by enjoining the collection of purchase money on the ground of defective title, it must clearly appear that the vendor knew of the defect in the title which the purchaser had no means of discovering, and that he fraudulently suppressed this knowledge. Where this does not appear and no suit is either prosecuted or threatened against the vendee for the property in question, no injunction will be allowed.<sup>13</sup> In conformity with this principle it is held that the fears and apprehensions of the vendee that his title may prove defective, will in no case warrant the interference of equity where he is still in undisturbed possession of the property.<sup>14</sup> And where the alleged defects do not amount to a total failure of consideration, and there has been no disturbance or eviction, and no suit brought by an adverse claimant, relief by injunction will be withheld.<sup>15</sup>

§ 387. **Injunction allowed when possession not given to purchaser.** Where the purchaser of land has never been placed in possession there seems to be stronger reason for allowing relief in equity against enforced payment of the purchase money.<sup>16</sup> Thus, an injunction has been allowed against a judgment on a bond for purchase money where possession of the property was not given at the time stipulated, and

<sup>12</sup> *Desvergers v. Willis*, 58 Ga., 388.

<sup>15</sup> *Hile v. Davison*, 5 C. E. Green, 228.

<sup>13</sup> *Beale v. Seiveley*, 8 Leigh, 658.

<sup>16</sup> *Hilleary v. Crow*, 1 Har. & J.,

<sup>14</sup> *Truly v. Wanzer*, 5 How., 141.

542; *Nelson v. Owen*, 3 Ired. Eq.,

See also *Cantrell v. Cobb*, 43 Ga., 175.

193.

where no conveyance had been made to the vendee. Under such circumstances, the vendee having received no conveyance is deprived of the legal remedy which he might have enforced upon the covenants of a deed had one been given.<sup>17</sup> So a suit for purchase money has been enjoined where the land was in the adverse possession of a third party having title to a portion of it, even though this fact was known to the purchaser at the time of the contract, the vendor having at that time agreed to put vendee in possession, which he has failed to do, and the answer admitting an inability to deliver possession.<sup>18</sup> And where land is sold conditionally, the purchaser taking a deed and giving his note for the purchase money, and upon failure of the condition the purchaser tenders back his deed and demands his note, the vendor remaining in possession, receiving the rents and selling timber from the premises, and refusing to surrender possession, the purchaser may enjoin the enforcement of a judgment upon the note, the bill alleging the vendor's insolvency.<sup>19</sup>

§ 388. **Outstanding incumbrances; covenants of quiet enjoyment.** Outstanding incumbrances or an outstanding equitable title will not warrant a court of equity in enjoining the collection of purchase money in behalf of a purchaser who is in peaceable possession under covenants of warranty.<sup>20</sup> And where the buyer has a full and ample remedy at law on his covenants of quiet enjoyment, he can not sustain a bill for an injunction on the ground of defect of title, but will be left to pursue his remedy at law.<sup>21</sup>

§ 389. **Pendency of action of ejectment.** While, as we have already seen, mere general averments of defective title, or the fears and apprehensions of a purchaser that the title will prove defective, will not warrant a court of equity in extend-

<sup>17</sup> *Hilleary v. Crow*, 1 Har. & J. 542.

<sup>19</sup> *Odell v. Reed*, 54 Ga., 142.

<sup>18</sup> *Nelson v. Owen*, 3 Ired. Eq., 175.

<sup>20</sup> *Elliott v. Thompson*, 4 Humph.,

99; *Senter v. Hill*, 5 Sneed, 505.

<sup>21</sup> *Wilkins v. Hogue*, 2 Jones Eq., 479.

ing relief,<sup>22</sup> yet it would seem that if the title is actually called in question by an action of ejectment, there is sufficient ground for restraining a recovery of the purchase money until the proceedings in ejectment are terminated.<sup>23</sup> But even in such case it has been held necessary to charge in the bill that the claim of title on which the ejectment proceedings are founded is a valid one. And an injunction has been refused against a sale of real estate under a mortgage given to secure purchase money, where the relief was sought on the ground that a third party had instituted proceedings in ejectment to recover the property, there being no allegation in the bill that the claim of title on which ejectment was brought was well founded. In other words, a mere claim of paramount title by a third person and his bringing suit upon such claim against the vendee, will not authorize an injunction against the vendor who has warranted the title to restrain him from proceeding to collect unpaid purchase money.<sup>24</sup> And courts of equity never interfere in behalf of a purchaser in this class of cases, unless the title is questioned by a suit either prosecuted or threatened, or unless the purchaser can clearly show that the title is defective.<sup>25</sup>

§ 390. **Injunction allowed when no conveyance given.** Where no conveyance has been given of the property contracted to be sold there are stronger equities in support of the relief by injunction than where the land has actually been conveyed, since the purchaser, having no covenants of warranty on which to enforce a remedy at law, is compelled to resort to equity for relief against an injury which might otherwise prove irreparable.<sup>26</sup> Thus, where one under pretense of

<sup>22</sup> *French v. Howard*, 3 Bibb, 301;  
*Truly v. Wanzer*, 5 How., 141.

<sup>23</sup> *Johnson v. Gere*, 2 Johns. Ch., 546.

<sup>24</sup> *Gayle v. Fattle*, 14 Md., 69;  
*Kinports v. Rawson*, 29 West Va., 487, 2 S. E., 85.

<sup>25</sup> *Ralston v. Miller*, 3 Rand., 44.

<sup>26</sup> *Brannum v. Ellison*, 5 Jones Eq., 435; *Buchanan v. Alwell*, 8 Humph., 516; *Topp v. White*, 12 Heisk., 165. And see *Boyce's Ex'rs v. Grundy*, 3 Pet., 210.

a title in himself assumes to sell land, taking bonds for the purchase money, but in reality having no title and giving no conveyance, he may be enjoined from attempting to enforce the collection of the bonds, complainant being required to surrender possession of the premises as a condition precedent to obtaining relief.<sup>1</sup> And where the vendor of real estate executes a bond for title and the purchaser executes a bond for the purchase price at the same time, the acts being concurrent acts and to be performed at one and the same time, it is error to dissolve a preliminary injunction against a judgment obtained by vendor for the purchase money, he having failed to execute a conveyance as required by his bond, and the injunction should be perpetuated to the hearing.<sup>2</sup>

§ 391. **Recovery barred by statute of limitations.** But where a vendee enters under a title bond from his vendor and holds the land under such title until the statute of limitations would bar a recovery by an adverse claimant, he will not be allowed to set up a defect of title in his vendor existing at the time of sale to him as a ground of injunction against a judgment for the purchase money.<sup>3</sup>

§ 392. **Sales of hazard.** Where a purchaser of land has accepted a conveyance without warranty of title, it has been held that an injunction would not lie against unpaid purchase money in the absence of fraud or concealment on the part of the vendor concerning the title.<sup>4</sup> Such a purchase may properly be termed a sale of hazard, and it may be laid down as a general rule that in sales of hazard equity will not interpose in the absence of fraud or misrepresentation.<sup>5</sup> Thus, where a sale of land is made in gross, the contract being one of hazard on both sides, the purchaser is not entitled to relief in

<sup>1</sup> *Brannum v. Ellison*, 5 Jones Eq., 435.

<sup>2</sup> *Brittain v. McLain*, 3 Ired. Eq., 165.

<sup>3</sup> *Amick v. Bowyer*, 3 West Va., 7.

<sup>4</sup> *Price's Ex'rs v. Ayres*, 10 Grat., 575.

<sup>5</sup> *Keyton v. Brawford*, 5 Leigh, 39; *Carrico v. Froman*, 2 Lit., 178;

*Sutton v. Sutton*, 7 Grat., 234.

equity in case of a deficiency in the amount.<sup>6</sup> And where the purchase is, as to the title, one of hazard, there being no fraud or concealment concerning the title by the vendor, a judgment for the purchase money will not be enjoined, even though the vendor represented the title as good when it was defective, his representations having been made in good faith.<sup>7</sup> In such cases the purchaser, having accepted the land without any agreement, either express or implied, for a conveyance with warranty, is regarded as having taken upon himself all risk as to the title, and he is therefore debarred from relief in a court of equity.<sup>8</sup>

§ 393. **Covenant not to withhold payment for want of conveyance.** The question as to whether equitable relief shall or shall not be given in a particular case may sometimes be determined by the nature of special stipulations made by the parties at the time of sale. Thus, where vendees contract at the time of purchase that their payments shall be made promptly and shall not be withheld when due for want of a conveyance, such agreement is sufficient, in the absence of fraud, to warrant a court of equity in denying relief by injunction against a judgment for payment which vendees have refused to make on account of defective title.<sup>9</sup>

§ 394. **False representations of vendor as to quantity; same as to use of water.** While in case of a sale of land in gross, the contract being one of hazard on both sides, equity will not, as we have already seen, interfere in aid of the purchaser on account of a deficiency in the amount of land conveyed,<sup>10</sup>

<sup>6</sup> Keyton v. Brawford, 5 Leigh, 39.

<sup>7</sup> Sutton v. Sutton, 7 Gratt., 234; Carrico v. Froman, 2 Lit., 178. In the latter case the vendee had contracted in his bond for the purchase money that it should not be withheld by bill in chancery or otherwise if any adverse claims

should be made to the land in question; the effect of this stipulation is not touched upon by the court in deciding the cause.

<sup>8</sup> Sutton v. Sutton, 7 Gratt., 234.

<sup>9</sup> Lucas v. Chapeze, 2 Lit., 31. And see Carrico v. Froman, 2 Lit., 178.

<sup>10</sup> Keyton v. Brawford, 5 Leigh, 39.



yet where the purchaser has relied upon the vendor's representations as to the amount of land the case is somewhat different. And a vendee who is not yet in possession may enjoin a judgment for the purchase money on the ground of deficiency in the amount where he has made the purchase relying entirely upon vendor's representations as to the amount, which representations prove to be false.<sup>11</sup> So where three separate tracts of land are sold, the title proceeding through as many separate sources or deeds, one of which entirely fails, so that the vendor could have had no authority to sell that tract, and there is a deficiency in the remaining tracts, a judgment for the purchase money may be enjoined to the extent of the deficiency in the land. Under such circumstances the relief is granted, not because of a deficiency in the amount conveyed, but because of an entire failure as to one tract, the land specified having in reality no existence.<sup>12</sup> So upon a bill by the purchaser to rescind a sale of real estate and to enjoin the collection of his notes given for the purchase money, where it was shown that the grantor had falsely represented at the time of sale that the owner of the premises sold was entitled to the use of water from a well upon an adjacent lot, it was held that, although the contract could not be rescinded, the purchaser was entitled to an injunction as to so much of the notes as would equal the cost of sinking a well upon the premises sold.<sup>13</sup>

§ 395. **Conflicting decisions.** We have already considered the doctrine that the purchaser of real estate in actual and peaceable possession under covenants of warranty will not be allowed to enjoin the collection of the purchase money on account of defective title. The authorities supporting that proposition are based upon the universally recognized rule that equity will never interpose for the purpose of granting

<sup>11</sup> *Lee v. Vaughan*, Ky. Dec., 238.

<sup>13</sup> *Elder v. Sabin*, 66 Ill., 126.

<sup>12</sup> *Strodes v. Patton*, 1 Marsh.

Dec., 228.

relief which may be had in the courts of law, and the vendee being in the enjoyment of undisturbed possession may find ample redress for any defect in title or disturbance of his possession by an action at law upon the covenants in his deed. Notwithstanding the array of respectable authorities in support of this rule, there are other cases, neither few in number nor wanting in authority, which have held a doctrine directly opposed to this, and the courts have freely exercised the jurisdiction, even though the purchaser was protected by the covenants in his deed. It remains to consider these cases, as well as the reasoning upon which they are based.

§ 396. **Cases where injunction allowed because of defective title.** The doctrine has been broadly laid down that a purchaser of real estate with general warranty is entitled to an injunction against the payment of the purchase money upon proof of an actual, outstanding, superior title in a third person, or of fatal defects in the title of his grantor.<sup>14</sup> Thus, where land is sold with covenants of warranty and a deed of trust is given to secure the payment of the purchase money, discovery of an adverse claim to the land has been held sufficient to warrant a court of equity in enjoining a sale under the trust deed until the cloud resting on the title is removed.<sup>15</sup> Nor is the right of the purchaser to an injunction on the

<sup>14</sup> *Gay v. Hancock*, 1 Rand., 72; *Miller v. Argyle's Ex'r*, 5 Leigh, 460; *Clarke v. Hardgrove*, 7 Grat., 399; *Koger v. Kane*, 5 Leigh, 606; *Dorsey v. Hobbs*, 10 Md., 412; *Yonge v. McCormick*, 6 Fla., 368; *Bullitt's Ex'rs v. Songster's Adm'rs*, 3 Munf., 55. But see, *contra*, *Swain v. Burnley*, 1 Mo. (2d edition), 286; *Bumpus v. Platner*, 1 Johns. Ch., 213; *Abbott v. Allen*, 2 Johns. Ch., 519; *Gayle v. Fattle*, 14 Md., 69; *Beale v. Seiveley*, 8 Leigh, 658; *Wilkins v. Hogue*, 2 Jones Eq., 479; *Elliott v. Thomp-*

*son*, 4 Humph., 99; *Senter v. Hill*, 5 Sneed, 505; *Truly v. Wanzer*, 5 How., 141.

<sup>15</sup> *Gay v. Hancock*, 1 Rand., 72. And see *Miller v. Argyle's Ex'r*, 5 Leigh, 460. And an injunction has been allowed to prevent a sale of real estate upon a judgment for unpaid purchase money, when the relief was sought for the protection of complainant in the value of improvements which he had put upon the premises. *Seago v. Bass*, 49 Ga., 9.

ground of defective title impaired by the circumstance of the vendor seeking to collect the unpaid purchase money from a third person on a collateral security assigned to such person by the purchaser.<sup>16</sup>

§ 397. **Entire failure or want of title.** Equitable relief has been allowed for the protection of a purchaser where the consideration for a contract of sale has entirely failed, the vendor having stripped himself of all title to the premises, legal or equitable, and being in no condition to comply with his contract to convey. In such case neither the vendor nor his assignees standing in his stead will be allowed to recover the purchase money, and a judgment on a bond for such money will be perpetually enjoined.<sup>17</sup> And where vendor at the time of making his agreement to convey was without title to the premises, an injunction may be allowed against proceedings at law upon the bond, the contract being treated as an unexecuted one until vendee has received that for which he has contracted.<sup>18</sup>

§ 398. **The doctrine in Indiana.** It is the established doctrine of the courts of Indiana that proceedings for the collection of unpaid purchase money may be enjoined at the suit of the vendee, until the vendor has made good the title, even although the vendee does not tender a reconveyance of the lands, the suit for the injunction being regarded not as a proceeding to rescind the sale, but rather to enforce it.<sup>19</sup> And the relief in such cases is granted regardless of the covenants in the vendor's conveyance, being based upon the element of fraud in the false representations made by the vendor.<sup>20</sup> So when the purchaser, relying upon the vendor's fraudulent

<sup>16</sup> *Clarke v. Hardgrove*, 7 Grat., 31; *Fitch v. Polke*, 7 Blackf., 564; 399. And see *Ingram v. Morgan*, 4 Warren v. Carey, 5 Ind., 319; *Hinkle v. Margerum*, 50 Ind., 240. See

<sup>17</sup> *Buchanan v. Lorman*, 3 Gill, 51.

<sup>18</sup> *Dorsey v. Hobbs*, 10 Md., 412.

<sup>19</sup> *Addleman v. Mormon*, 7 Blackf.,

also *Reed v. Tioga Manufacturing Co.*, 66 Ind., 21.

<sup>20</sup> *Hinkle v. Margerum*, 50 Ind., 240.

representations as to his title, remains in ignorance of the fact that the vendor had not a good title until after judgment is obtained against him for the unpaid purchase money, such ignorance is a sufficient excuse for not defending at law, and he may, therefore, enjoin the judgment.<sup>21</sup> But it is held that the injunction should not be granted when it is not shown that the vendor is insolvent.<sup>22</sup>

§ 399. **Effect of garnishee proceedings against purchaser.** Relief by injunction may also be granted in aid of a purchaser of real estate who is harassed by different proceedings for the collection of the purchase money, not only by the vendor, but by his judgment creditors seeking to reach the purchase money through garnishee proceedings. Thus, where a purchaser is in possession, not having paid all the purchase money, and a judgment creditor of the vendor obtains judgment against the purchaser in a garnishee proceeding, and is endeavoring to sell the land which is subject to the lien of his judgment, the purchaser is entitled to the aid of an injunction to restrain the vendor from collecting a note given for the unpaid purchase money.<sup>23</sup>

§ 400. **Vendor's insolvency ground for relief.** The question of insolvency of the vendor as affecting the right of the purchaser to enjoin the collection of unpaid purchase money upon a failure of title, in whole or in part, is one of much practical importance, and upon which there is the same noticeable want of harmony in the rulings of the courts which prevails in other branches of the jurisdiction which forms the subject of the present chapter. The weight of authority, however, is clearly in support of the right to an injunction in such cases, when by reason of his insolvency the vendor is unable to respond in damages in an action at law. And the relief is extended in such cases upon the ground that the legal remedy being

<sup>21</sup> *Fitch v. Polke*, 7 Blackf., 564.

<sup>23</sup> *Fillingim v. Thornton*, 49 Ga.,

<sup>22</sup> *Wimberg v. Schwegeman*, 97

Ind., 528.

insufficient by reason of such insolvency, a court of equity is the only source to which resort can be had for the redress of a grievance which might otherwise prove irreparable.<sup>24</sup> Where, therefore, the title to the lands conveyed has partially failed, the purchaser may enjoin the vendor from transferring the notes and mortgage given for the purchase money, the bill alleging the vendor to be irresponsible, since if the notes were transferred to an innocent holder the purchaser might suffer an irreparable injury.<sup>25</sup> The doctrine of relief, upon the ground of insolvency has been carried even farther, and it has been held that a purchaser in possession, under covenants of general warranty, even though the title has not been questioned by suit either prosecuted or threatened, may enjoin the collection of purchase money upon proof of defective title, if the vendor through insolvency is unable to respond in damages in an action upon the covenants of warranty.<sup>26</sup> Upon the other hand, it has been sought to restrict the exercise of the jurisdiction to cases where the element of fraud is coupled with that of the insolvency of the vendor. And a purchaser seeking to enjoin a sale of lands for unpaid purchase money upon the ground of the vendor's insolvency and the pendency of suits by third persons claiming title to the lands has been denied relief in the absence of any allegations of fraud against his vendor.<sup>27</sup>

§ 401. **Judicial sales.** The authorities are unsettled as to whether relief by injunction in cases of defective title may be extended to enforced sales under judicial process. Upon the one hand, it has been held that where the purchaser of land at a sale under execution has given a bond for the purchase price,

<sup>24</sup> *Yonge v. McCormick*, 6 Fla., 368; *McDunn v. City of Des Moines*, 34 Iowa, 467. See also *Fehrle v.*

*Turner*, 77 Ind., 530. See, *contra*, *Strong v. Downing*, 34 Ind., 300,

overruled in part in *Fehrle v. Turner*, 77 Ind., 530.

<sup>25</sup> *McDunn v. City of Des Moines*, 34 Iowa, 467.

<sup>26</sup> *Yonge v. McCormick*, 6 Fla., 368.

<sup>27</sup> *Strong v. Downing*, 34 Ind., 300.



he may restrain the enforcement of the bond on showing that defendant in execution had no title to the land sold, the purchaser having acted in good faith.<sup>28</sup> Upon the other hand, it has been held that a purchaser at a judicial sale can only obtain relief on the ground of defective title by resisting the confirmation of the sale in the proceedings at law wherein such sale was ordered, and he is not entitled to enjoin a judgment on his bond for the purchase money.<sup>29</sup>

§ 402. **Violation of vendor's agreement.** It may sometimes happen that the vendor has by his own agreement placed himself in such position that it would be inequitable to allow him to proceed at law for the collection of purchase money. Thus, where he has entered into a contract under seal with the vendee that he will not bring suit upon the bond given as security for part of the purchase price until the quantity of the land shall be definitely ascertained, and in violation of his agreement has instituted proceedings at law for a recovery upon the bond before the quantity of the land has been ascertained, it has been held that the proceedings upon the bond might be perpetually enjoined.<sup>30</sup> And when land is sold under an agreement that the vendee shall withhold payment of the purchase price until the vendor shall furnish a full and complete title, the latter may be enjoined from enforcing a mortgage securing the unpaid purchase money until he has complied with his contract to furnish a good title.<sup>31</sup>

§ 403. **Vendor's failure to procure outstanding title.** Failure of the vendor to comply with his agreement to procure a relinquishment of outstanding titles or interests in the land conveyed has sometimes been held sufficient ground for the interference of equity by injunction.<sup>32</sup> Thus, where the ven-

<sup>28</sup> *Bartlett v. Loudon*, 7 J. J. Marsh., 641.

<sup>29</sup> *Threlkelds v. Campbell*, 2 Grat., 198.

<sup>30</sup> *Bullitt's Ex'rs v. Songster's Adm'rs*, 3 Munf., 55.

<sup>31</sup> *Wade v. Percy*, 24 La. An., 173.

<sup>32</sup> *McKoy v. Chiles*, 5 Monr., 259; *Jaynes v. Brock*, 10 Grat., 211.

dor has contracted to procure a conveyance to the vendee of the title of other joint owners of the premises, but fails to do so, he may be enjoined from enforcing a judgment upon vendee's bond for the purchase price, even though the vendee himself procures the remainder of the title directly from the other owners.<sup>33</sup> So the failure of the grantor to procure a relinquishment of his wife's dower, which he had agreed to do when the purchaser accepted his conveyance, has been held sufficient ground for enjoining a judgment for the purchase money. But an injunction granted under such circumstances will be dissolved on vendor afterward procuring a release of the wife's dower, though the writ having been properly granted in the first instance no damages will be allowed upon its dissolution.<sup>34</sup>

§ 404. **Injunction allowed when legal remedy inoperative.**

The fact that the remedy at law against the grantor with covenants of warranty is inoperative affords strong ground for relief in equity against payment of purchase money. And where the grantor is a non-resident and has not sufficient property in the state to satisfy a judgment in damages for breach of his covenants of warranty, the injunction may be allowed on proof of defective title, especially where the purchaser has not yet obtained possession of that portion of the land to which the title is defective, it being held adversely.<sup>35</sup>

§ 405. **Duty of vendor seeking dissolution.** Where the vendor of real estate, who has been enjoined from collecting the purchase money on account of defective title, seeks a dissolution of the injunction the burden is thrown upon him of establishing a good title.<sup>36</sup> And in such case the vendor will be

<sup>33</sup> *Jaynes v. Brock*, 10 Grat., 211.

<sup>34</sup> *McKoy v. Chiles*, 5 Monr., 259. And see as to refusal of damages on dissolution of an injunction properly granted to restrain payment of purchase money, *Porter v.*

*Scobie*, 5 B. Mon., 387; *Lampton v. Usher's Heirs*, 7 B. Mon., 57; *Fishback v. Williams*, 3 Bibb, 342. And see, *post*, § 413.

<sup>35</sup> *Richardson v. Williams*, 3 Jones Eq., 116.

<sup>36</sup> *Moredock v. Williams*, 1 Overt..

required to produce his title to the court in order that it may be satisfied of its sufficiency to warrant a dissolution of the injunction.<sup>37</sup> Nor will the purchaser be required to accept a conveyance from a third person to perfect the title, he being protected by the covenants of warranty of his vendor.<sup>38</sup>

§ 406. **Injunction rarely perpetuated.** While, as we have seen in the preceding sections, the jurisdiction in restraint of the payment of purchase money is freely exercised, a perpetual injunction will rarely be granted, and equity will only extend its protection until the defective title is cured, or until the purchaser can pursue his remedy at law on his covenants of warranty.<sup>39</sup> And if the purchaser under a general warranty, who has procured a preliminary injunction, fails to prosecute his legal remedy on his covenants of warranty within a reasonable period the injunction will be dissolved.<sup>40</sup> So where the vendee has obtained an injunction on the ground of defective title, the vendor is entitled to a dissolution on curing the defect by a conveyance of the outstanding title, even though there are general allegations in the bill of other outstanding title, such allegations being unsupported by proof.<sup>41</sup> And a vendee who has obtained an injunction against a judgment for purchase money of real estate is not entitled to have his injunction perpetuated and to have the benefit of his purchase at the same time.<sup>42</sup>

§ 407. **Purchaser with knowledge of defect can not enjoin.** The relief in this class of cases resting principally upon fraud

325; *Moore v. Cook*, 2 Hayw. (Tenn.), 84.

<sup>37</sup> *Moredock v. Williams*, 1 Overt., 325.

<sup>38</sup> *Moore v. Cook*, 2 Hayw. (Tenn.), 84.

<sup>39</sup> *Lovell v. Chilton*, 2 West Va., 410; *Swain v. Burnley*, 1 Mo. (2d edition), 286. But it has been held that a dissolution should never be allowed until the tender of a good and sufficient title, and that

if allowed before vendor has made good the title the injunction should be reinstated. *Grantland v. Wight*, 2 Munf., 179.

<sup>40</sup> *Swain v. Burnley*, 1 Mo. (2d edition), 286.

<sup>41</sup> *Lovell v. Chilton*, 2 West Va., 410.

<sup>42</sup> *Markham v. Todd*, 2 J. J. Marsh., 364; *Edwards v. Strode*, 2 J. J. Marsh., 506.

on the part of the vendor, the jurisdiction will not be exercised in favor of one who buys with full knowledge of a defective title, since in such case he assumes all risk as to the condition of the title, and is not misled by fraudulent representations on the part of the grantor.<sup>43</sup> And one who purchases real estate knowing at the time of purchase that the title is doubtful, will not be permitted after taking possession of the premises to enjoin a judgment for the purchase money on the ground of defective title and because his conveyance proves to be of a life estate instead of the fee simple. In such case the vendor will be decreed to make a conveyance of the fee, and the purchaser will be left to his remedy at law on his covenants of warranty.<sup>44</sup>

§ 408. **Rescission of contract by purchaser.** The question of whether the jurisdiction will be exercised where the purchaser does not offer to rescind the contract and restore possession to the grantor may still be regarded, owing to the unsettled state of the authorities, as an open one. The doctrine has been broadly asserted that the purchaser in possession seeking to enjoin payment of the purchase money on the ground of failure of title, will in no event be allowed relief where he does not pray a rescission of the contract or offer to restore possession to the grantor.<sup>45</sup> Upon the other hand, it is held that an injunction will lie on the ground of failure of title, even though no offer is made by the purchaser to rescind the contract of sale, and no tender is made of a reconveyance, since the purpose of the suit for an injunction is not to rescind the contract of sale or the conveyance, but rather to enforce it.<sup>46</sup> Indeed, a still broader doctrine has been asserted, and it has been held that a deficiency in the quantity of land sold,

<sup>43</sup> *Williamson v. Raney*, Freem. 187. And see *Markham v. Todd*, Ch., 112. 2 J. J. Marsh., 364.

<sup>44</sup> *Merritt v. Hunt*, 4 Ired. Eq., 406. <sup>46</sup> *Warren v. Carey*, 5 Ind., 319; *Addleman v. Mormon*, 7 Blackf.,

<sup>45</sup> *Williamson v. Raney*, Freem. 31; *Fitch v. Polke*, 7 Blackf., 564; Ch., 112; *Jackson v. Norton*, 6 Cal., *Hinkle v. Margerum*, 50 Ind., 240.

if discovered before the purchase money is all paid, while it will warrant an injunction, does not constitute a sufficient ground for rescinding the contract where the vendor is guilty of no fraud and has sold without warranty.<sup>47</sup>

§ 409. **Effect of special stipulations as to payment.** In conformity with the general rule denying relief in equity upon grounds which might have availed in defense of an action at law, an injunction against a judgment for purchase money will not be sustained because of a dispute concerning title where by the terms of the contract the purchaser is not obliged to pay the final installment until the question of disputed title shall be determined. The purchaser under such contract, having failed to avail himself of his defense in the suit at law for the final installment of the purchase price, is by his own negligence barred from relief in equity.<sup>48</sup> And where by the terms of the contract of sale the purchaser is not to receive title until full payment is made, he will not be allowed to enjoin an action at law for the purchase money on the ground of failure of title where he has not offered to pay the money.<sup>49</sup>

§ 410. **Difficulty in obtaining title resulting from purchaser's own negligence.** Mere difficulty in obtaining title resulting from the purchaser's own negligence will not warrant a court of equity in interposing for his protection where no especial blame attaches to the vendor. Thus, a judgment for purchase money will not be enjoined because of difficulty in obtaining title from infant heirs of the vendor, the purchaser having neglected during the lifetime of vendor to make payment and obtain a conveyance.<sup>50</sup>

§ 411. **Set-off; recoupment; unpaid taxes.** It is a well established principle that unliquidated damages can not be urged

<sup>47</sup> *Moredock v. Rawlings*, 3 Monr., 73.

<sup>48</sup> *Allen v. Phillips*, 2 Lit., 1.

<sup>49</sup> *Mitchell v. Sherman*, Freem. Ch., 120.

<sup>50</sup> *Prout v. Gibson*, 1 Cranch C. C., 389. In this case the infant heirs were not made parties to the bill.



by way of set-off in proceedings in equity. In conformity with this principle it is held that a bill will not lie to enjoin an unpaid balance of purchase money whose real object is to obtain damages for an alleged fraud in the transaction. The object of such proceedings being simply to procure damages a court of law is the proper forum in which to seek relief.<sup>51</sup> Nor will a judgment for purchase money be enjoined for the purpose of allowing the purchaser to introduce matters of recoupment and deductions claimed by him on the ground of usury, when his legal remedy is clear for the redress of such grievancees.<sup>52</sup> And where an injunction is sought on the ground of unpaid taxes which constitute a lien on the premises, if the amount of the taxes is so small as to fall below the amount fixed by statute as the minimum of the jurisdiction of the court, the relief will be refused.<sup>53</sup>

§ 412. **Diligence required in remedy at law.** A purchaser seeking the aid of equity against the enforcement of the vendor's right to the purchase money on the ground of fraud, must use reasonable diligence in availing himself of whatever remedy he may have at law. And where a purchaser of realty, claiming that he was induced to purchase by false and fraudulent representations as to a never-failing spring upon the premises, neglects to pursue his legal remedy, either by recouping his damages in an action brought by the vendee for the balance of the purchase money, or by a separate action of his own for the fraud, he will not be allowed to restrain vendor from enforcing his judgment for the purchase money.<sup>54</sup>

§ 413. **Damages on dissolution.** Since the question of damages on the dissolution of an injunction is dependent upon whether the jurisdiction was properly exercised upon sufficient cause in the first instance, it follows that where an injunction

<sup>51</sup> *Robertson v. Hogsheads*, 3 Leigh, 667; *Koger v. Kane*, 5 Leigh, 606. And see *Frieze v. Chapin*, 2 R. I., 429.

<sup>52</sup> *Collins v. Clayton*, 53 Ga., 649.

<sup>53</sup> *Reynolds v. Howard*, 3 Md. Ch., 331.

<sup>54</sup> *Hall v. Clark*, 21 Mo., 415.

has been properly granted against a judgment for purchase money because of defective title to the premises conveyed and has been dissolved upon the title being perfected by the grantor, no damages should be allowed upon the dissolution. In such cases, the purchaser having properly invoked the aid of equity for the protection of his right should not be compelled to pay damages to the vendor who alone is in fault.<sup>55</sup>

<sup>55</sup> *Fishback v. Williams*, 3 Bibb, obtains an injunction on the 342; *McKoy v. Chiles*, 5 Monr., ground of defective title is entitled 259; *Porter v. Scobie*, 5 B. Monr., to costs, even though the title 387; *Lampton v. Usher's Heirs*, 7 should afterward be made good. B. Monr., 57; *Reeves v. Dickey*, 10 *Reeves v. Dickey*, 10 Grat., 138. And the purchaser who

## VI. EJECTMENT.

- § 414. Equity averse to interference with ejectment.
- 415. Injunction refused where defense can be made at law.
- 416. Payment of rent.
- 417. Estoppel by plaintiff in ejectment.
- 418. Fraud of plaintiff in ejectment ground for injunction; illustrations.
- 419. Prior jurisdiction of equity ground for injunction.
- 420. Cloud upon title; equal equities.
- 421. Mistake of fact ground for injunction.
- 422. Multiplicity of suits.
- 423. Repudiation of infant's contract.
- 424. Statute of limitations.
- 425. Rights of mortgagees.
- 426. Parties to the action.
- 427. Rights of tenants; crops.
- 428. When plaintiff in ejectment allowed to proceed to trial.
- 429. Death of defendant before answer.
- 429a. Writ of possession enjoined until compensation for improvements.

§ 414. **Equity averse to interference with ejectment.** Although injunctions are sometimes granted to stay proceedings in ejectment for the recovery of real property, the jurisdiction is by no means a favorite one with courts of equity, and the usual course, in the absence of fraud or some special circumstances demanding the relief, is to leave all questions of title to be determined by courts of law. And it may be asserted generally that equity will not in the course of judicial proceedings restrain a person from asserting title to real estate unless in a case entirely free from doubt. Where, therefore, the title is being tested by an action of ejectment in a common law court having jurisdiction of the subject-matter, a court of equity will rarely interfere or enjoin the proceedings.<sup>1</sup> An injunction under such circumstances would be re-

<sup>1</sup> *Stockton v. Williams*, 1 Doug. *Savage v. Allen*, 54 N. Y., 458, affirmed (Mich.), 546; *Northeastern R. Co. v. Firming S. C.*, 59 Barb., 291. *v. Barrett*, 65 Ga., 601. See also

pugnant to the well established principle that where there is concurrent jurisdiction over the same subject-matter in different tribunals, the right of determining the controversy attaches to that tribunal to which resort is first had.<sup>2</sup>

§ 415. **Injunction refused where defense can be made at law.**

In conformity with the principles laid down in the preceding section, proceedings in ejectment will not be enjoined where the questions of title involved may be properly determined at law, or where the ground relied upon for an injunction would be equally available if urged as a defense to the action of ejectment.<sup>3</sup> Thus, where a preliminary injunction has been granted against proceedings in ejectment, it will be dissolved as to that part of the property in controversy, the title to which may be properly determined in the proceedings at law.<sup>4</sup> Nor will an injunction be retained restraining an action of ejectment where it is perfectly clear and apparent that complainants have a good defense to the action at law, and that the deed on which plaintiff in ejectment relies is utterly void, but the parties will be left to the decision of a court of law.<sup>5</sup> Where, therefore, complainants are in possession of real estate, they can not enjoin defendant who is out of possession from prosecuting an action of ejectment against them for the recovery of the premises, upon the ground that the deed under which plaintiff in ejectment claims is absolutely void, either

<sup>2</sup> *Stockton v. Williams*, 1 Doug. (Mich.), 546; *Northeastern R. Co. v. Barrett*, 65 Ga., 601.

<sup>3</sup> *Camden & Amboy R. Co. v. Stewart*, 3 C. E. Green, 489; *Morris Canal & Banking Co. v. Jersey City*, 1 Beas., 227; *Savage v. Allen*, 54 N. Y., 458, affirming S. C., 59 Barb., 291; *Northeastern R. Co. v. Barrett*, 65 Ga., 601; *Shaw v. Chambers*, 48 Mich., 355; *Gable v. Wetherholt*, 116 Ill., 313, 6 N. E., 453; *Mountain Lake P. Assn. v. Shartzler*, 83 Md., 10, 34 Atl., 536;

*Byrne v. Brown*, 40 Fla., 109, 23 So., 877; *Hawkinberry v. Snodgrass*, 39 West Va., 332, 19 S. E., 417. As to the right to enjoin the taking out of a writ of possession for the enforcement of a judgment in ejectment, see *Buchannon v. Upshaw*, 1 How., 56.

<sup>4</sup> *Camden & Amboy R. Co. v. Stewart*, 3 C. E. Green, 489.

<sup>5</sup> *Morris Canal & Banking Co. v. Jersey City*, 1 Beas., 227; *Bishop of Chicago v. Chiniquy*, 74 Ill., 317.

for want of delivery and acceptance, or because obtained by duress and fraud, since in either event the defense in the action of ejectment would be complete.<sup>6</sup> And where the proceedings in ejectment have reached a final judgment, equity will not lend its aid for the purpose of restraining the enforcement of such judgment upon grounds which might properly have been urged in defense of the action.<sup>7</sup>

§ 416. **Payment of rent.** It is regarded as extremely doubtful whether a court of equity would, under any circumstances, restrain proceedings in ejectment brought for the non-payment of rent.<sup>8</sup> And the fact that defendant in the injunction suit is prosecuting an action of ejectment against complainant, as well as an action to recover possession of the same premises for non-payment of rent, affords no ground for enjoining the proceedings at law, since the defense should be interposed to the actions at law, and defendant, if successful in either of those actions, could plead the judgment in bar of the other suit.<sup>9</sup> So, pending an action in the nature of ejectment for the recovery of real property, both parties claiming title thereto and defendants being in possession, one of the defendants will not be enjoined from paying rent to another, since equity does not interfere to restrain a defendant from enjoying the fruits of his possession and claim of title pending the litigation, when it is not shown that complainant will lose the benefit of his recovery if he establishes his title.<sup>10</sup>

§ 417. **Estopped by plaintiff in ejectment.** Where, however, plaintiff in ejectment is in equity and conscience estopped from any claim to recover the premises, as where his conduct has been such as to warrant defendant in going on with the erection of works and the expenditure of large amounts of money, the action may properly be enjoined.<sup>11</sup> And where

<sup>6</sup> *Bishop of Chicago v. Chiniquy*,  
74 Ill., 317.

<sup>7</sup> *Agard v. Valencia*, 39 Cal., 292.

<sup>8</sup> *Clancy v. Roberts*, 1 Ir. Eq., 21.

<sup>9</sup> *Grissler v. Stuyvesant*, 67 Barb.,  
77.

<sup>10</sup> *Baldwin v. York*, 71 N. C., 463.

<sup>11</sup> *Trenton Banking Co. v. McKel-*



one has encouraged the making of expenditures upon land to such an extent that the parties can be reimbursed only by the enjoyment of the land itself, he may be enjoined from prosecuting an action of ejectment to recover possession of the premises.<sup>12</sup> So where complainant was let into possession of real estate for the purpose of building thereon, under a parol agreement with the owner for a lease for a term of years, and he has in good faith expended a large sum of money in improvements upon the premises, under an agreement or understanding with the owner that he should not be disturbed in his possession, equity may properly enjoin the owner from bringing ejectment.<sup>13</sup> So, too, the conduct of the ancestor may be such as to operate as an estoppel against himself or his heir, to prevent the assertion of the legal title to the premises. For example, where the owner of real estate fences off a portion and declares his intention of giving it to his nephew, puts him in possession and encourages him to make valuable improvements thereon under a promise to convey the title to him, but dies without making such conveyance, equity will enjoin the heir from prosecuting an action of ejectment for the recovery of the lands.<sup>14</sup> And upon a bill to enforce specific performance of an agreement for a lease, complainant having expended considerable sums in improving the premises under his agreement with the lessor, an injunction was allowed to restrain an action of ejectment by the lessor upon condition of complainant submitting to judgment in ejectment and undertaking to abide such order as the court of equity might make with respect to the delivery of possession, and also undertaking to expedite the hearing of the chancery cause.<sup>15</sup>

way, 4 Halst. Ch., 84; Big Mountain Iron Co.'s Appeal, 54 Pa. St., 361; Thornton v. Ramsden, 4 Gif., 519; Attwood v. Barham, 2 Russ., 186.

<sup>12</sup> Big Mountain Iron Co.'s Appeal, 54 Pa. St., 361.

<sup>13</sup> Thornton v. Ramsden, 4 Gif., 519.

<sup>14</sup> Burton v. Duffield, 2 Del. Ch., 130.

<sup>15</sup> Attwood v. Barham, 2 Russ., 186.

And a court of equity may enjoin an action of ejectment based upon a title derived through the foreclosure of a mortgage which, at the time of the purchase of the land by complainant from the mortgagor, defendant agreed not to hold as a charge against the property, thereby creating an equitable estoppel against the assertion of the mortgage.<sup>16</sup> So equity will restrain an action of ejectment brought against a railroad company to recover possession of land occupied as a right of way without compensation therefor to the owner, where the plaintiff in the ejectment is equitably estopped by his acquiescence in the construction of the road from asserting title to the land. And in such case complainant will not be compelled to make compensation as a condition to the granting of relief in the absence of a cross-bill seeking it.<sup>17</sup> But where the bill affirmatively offers to pay an equitable compensation for the right of way, the injunction should not be granted until the amount of such compensation is ascertained and paid.<sup>18</sup>

§ 418. **Fraud of plaintiff in ejectment ground for injunction; illustrations.** Fraudulent conduct and bad faith upon the part of plaintiff in ejectment has been treated, in some instances, as constituting sufficient foundation for preventive relief against the judgment.<sup>19</sup> Thus, a judgment in ejectment has been enjoined when plaintiff in that action had obtained his title in bad faith and in fraud of complainant's rights in the same premises, of which he was fully advised.<sup>20</sup> And where an infant who had attained years of discretion conveyed land to her father to enable him to borrow money thereon by mortgage, the mortgagee loaning the money in ignorance of the fact of infancy, and being afterward obliged to take a con-

<sup>16</sup> *Fields v. Killion*, 129 Ala., 373, 29 So., 797.

<sup>17</sup> *Hendrix v. Southern Ry. Co.*, 130 Ala., 205, 30 So., 596, 89 Am. St. Rep., 27.

<sup>18</sup> *McLure v. Ala. M. Ry. Co.*, 130 Ala., 436, 30 So., 440.

<sup>19</sup> *Ferguson v. Bobo*, 54 Miss., 121; *Parrill v. McKinley*, 6 West Va., 67; *Big Mountain Iron Co.'s Appeal*, 54 Pa. St., 361; *Reavis v. Reavis*, 50 Ala., 60.

<sup>20</sup> *Parrill v. McKinley*, 6 West Va., 67.

veyance from the father in part satisfaction of the mortgage debt, and the infant then recovered judgment for the land in ejectment, it was held that she was estopped from asserting her legal title, and that the judgment should be enjoined upon the ground of fraud and estoppel.<sup>21</sup> So an injunction has been allowed against the prosecution of an action of ejectment for the recovery of lands occupied by a railway company, plaintiff in ejectment having acquired his title with actual notice of the occupancy and interest of the railway company in the lands.<sup>22</sup> And in conformity with the doctrine of implied trusts, ejectment against a corporation may be restrained where plaintiff in the action has acted for the corporation, and where, though taking the title in his own name, he is considered in equity as a trustee for the company.<sup>23</sup> So when a vendor of lands recovers judgment against the purchaser for the unpaid purchase money, and it is then agreed between the parties that the father of the purchaser shall pay the judgment and take a conveyance of the premises directly from the original vendor, whose unrecorded deed to the original purchaser is to be given up and canceled, and the arrangement so made is carried out accordingly, but the first purchaser then brings ejectment against his father, the action may properly be enjoined.<sup>24</sup> And where ejectment is brought by heirs against a purchaser of lands of the deceased at a void probate sale made by his administrator, the purchaser having paid the purchase money to the administrator, who has distributed it in good faith among the creditors of the deceased, while equity will not enjoin the prosecution of the action of ejectment by the heirs, it may properly restrain the execution of the judgment by taking possession, until the purchase money has been refunded.<sup>25</sup>

<sup>21</sup> *Ferguson v. Bobo*, 54 Miss., 121.

<sup>24</sup> *Reavis v. Reavis*, 50 Ala., 60.

<sup>25</sup> *Hill v. Billingsly*, 53 Miss., 111.

<sup>22</sup> *Detroit & M. R. Co. v. Brown*, 37 Mich., 533.

See also *Gaines v. Kennedy*, 53 Miss., 103.

<sup>23</sup> *Big Mountain Iron Co.'s Appeal*, 54 Pa. St., 361.

**§ 419. Prior jurisdiction of equity ground for injunction.**

It is also regarded as an appropriate exercise of the preventive jurisdiction of equity to enjoin actions of ejectment for the purpose of confining the litigation to the forum in which it was originally begun. An injunction has therefore been granted to restrain ejectment for the same lands for the recovery of which plaintiff in ejectment has previously filed a bill in equity which is still pending.<sup>26</sup> And pending a bill in equity to establish a will, a defendant to the bill and heir at law of the testator has been restrained from prosecuting an action of ejectment for the recovery of the devised estate.<sup>27</sup> While, however, it is proper under certain circumstances to enjoin the trial of an action of ejectment until a final hearing upon a bill in equity, the injunction should not be so framed as to prevent defendant from using his deed upon the trial.<sup>28</sup> And where, pending an action of ejectment to recover lands, defendant files a bill seeking to have an alleged invalid mortgage, through which the ejectment plaintiff claims title, set aside as cloud upon the title, equity, having taken jurisdiction for that purpose, will enjoin the prosecution of the action of ejectment and determine the entire controversy.<sup>29</sup>

**§ 420. Cloud upon title; equal equities.** Actions of ejectment may also be enjoined in equity when the relief is necessary for the purpose of preventing a cloud upon title. Thus, the owner in fee of real property may restrain the prosecution of an action of ejectment by a claimant under a sheriff's deed which vests an apparently good title in the grantee, on the ground that the sheriff's deed constitutes a cloud upon the title.<sup>30</sup> Where, however, as between the parties to the action the equities are equal, an injunction will be withheld. Thus, equity will not on behalf of a purchaser of real estate

<sup>26</sup> *Bull v. Bodie*, Dick., 1.

<sup>29</sup> *Richardson v. Stephens*, 122

<sup>27</sup> *Edgecumbe v. Carpenter*, 1 Ala., 301, 25 So., 39.  
Beav., 171.

<sup>30</sup> *Sieman v. Austin*, 33 Barb., 9.

<sup>28</sup> *Blizzard v. Nosworthy*, 50 Ga.,  
514.

who has given his bond for the purchase money, enjoin an action of ejectment brought by an innocent purchaser in good faith and without knowledge of complainant's rights. In such case the equities being equal the parties will be left to their remedy at law.<sup>31</sup>

§ 421. **Mistake of fact ground for injunction.** A mistake of fact may sometimes constitute sufficient ground for restraining proceedings in ejectment. And where on a sale of lands under execution against judgment debtors in possession, the sheriff's deed by mistake omitted a portion of the land, an injunction has been allowed to restrain the judgment debtors from an action of ejectment to recover the premises from an innocent purchaser, who had acted in good faith and under the impression that he was buying the whole.<sup>32</sup> So if by mutual mistake of the parties the description of land in a conveyance, under which plaintiff in ejectment claims title, covers a much larger quantity of land than was intended to be conveyed, and plaintiff is in actual possession of that portion of the land to which he is rightfully entitled under the conveyance as intended, he may be enjoined from further prosecuting his action.<sup>33</sup> Where, however, through the mistake of a surveyor, complainant has erected his building a few inches across the line and upon defendant's premises, he will not be allowed to enjoin defendant from prosecuting an action of ejectment for the recovery of the strip so built upon, defendant having no knowledge of the encroachment when the building was erected.<sup>34</sup>

§ 422. **Multiplicity of suits.** The prevention of a multiplicity of suits is a favorite ground for the jurisdiction of equity in restraint of proceedings at law, and will avail as well in restraining actions of ejectment as those of any other nature.

<sup>31</sup> *McFarlane v. Griffith*, 4 Wash. C. C., 585.

<sup>33</sup> *Bush v. Hicks*, 60 N. Y., 298.

<sup>34</sup> *Kirchner v. Miller*, 39 N. J.

<sup>32</sup> *DeRiemer v. Cantillon*, 4 Eq., 355.  
Johns. Ch., 85.



Thus, where one is in full possession of land with complete legal title, though not all appearing of record, he may enjoin a number of ejectment suits brought against him as to a portion of the premises, since the question is the same as to all and may be determined by a single suit in chancery, thus avoiding a multiplicity of actions.<sup>35</sup> And after two verdicts in his favor in ejectment, complainant has been allowed an injunction.<sup>36</sup> But a distinction is to be observed between bills for the prevention of multiplicity of suits, or bills of peace, whose object is the suppression of useless and vexatious litigation, and cases where the real object of the relief sought is the consolidation of a number of suits of like nature, since in the former class of cases courts of equity may properly enjoin, but in the latter they will refuse to interfere. Thus, where an injunction was asked to stay proceedings in ninety-two actions of ejectment, until one or more might be tried, the parties, pleadings, title and testimony being the same in all the cases, the relief was refused, the real object sought being a consolidation of the actions which a court of law might properly grant.<sup>37</sup>

§ 423. **Repudiation of infant's contract.** An injunction will not be allowed against proceedings in ejectment brought by the owner of land after attaining his majority, who while an infant had contracted for the sale of the land, and given a bond for the conveyance, but had repudiated the contract on coming of age, and refused to ratify the sale, even though the purchase money had been paid.<sup>38</sup>

§ 424. **Statute of limitations.** The fact that an action of ejectment is barred by the statute of limitations, will not of itself suffice to warrant an injunction against the proceedings,

<sup>35</sup> Woods v. Monroe, 17 Mich., injunction would be allowed  
238. against the remaining suits after

<sup>36</sup> Leighton v. Leighton, 1 P. verdict obtained in several, *quære*.  
Wms., 671.

<sup>38</sup> Brawner v. Franklin, 4 Gill,

<sup>37</sup> Peters v. Prevost, 1 Paine C. 463.

C., 64. Whether in such case the

where the parties in interest have been incapacitated from bringing suit. Thus, ejectment by an administrator to recover land for the benefit of the heirs of a decedent will not be enjoined on the ground that the statute of limitations has run, where neither of the heirs has been in a condition to sue, one of them being *non compos* and the other a *feme covert*.<sup>39</sup>

§ 425. **Rights of mortgagees.** Where a preliminary injunction has been granted to restrain the prosecution of an action of ejectment, upon the ground that the transaction out of which plaintiff in ejectment claims to derive title was in reality a mortgage, from which defendant seeks to redeem, and files a bill for that purpose, and to enjoin the proceedings at law, the injunction should be made perpetual on the right of redemption being established, and it is error if the court does not so direct.<sup>40</sup> But a mortgagee who has recovered judgment in ejectment for the mortgaged premises will not, before a hearing, be enjoined from proceeding with the enforcement of his judgment.<sup>41</sup>

§ 426. **Parties to the action.** As regards the parties who may properly enjoin proceedings in ejectment, it may be observed that the right to the relief is not confined to those who were originally joined as defendants in the action, but it may be extended to others who are subsequently joined as defendants. And a defendant in ejectment is not deprived of his right to relief against the judgment because of his having come into the ejectment suit after it was begun, by purchasing the interest of the tenant and joining with him in the defense.<sup>42</sup> But an injunction has been refused when sought to restrain the execution of a judgment in ejectment upon a bill filed by a landlord, who might have made himself a defendant to the action of ejectment, but neglected so to do.<sup>43</sup>

<sup>39</sup> Fleming v. Collins, 27 Ga., 494.

<sup>42</sup> Hackwith v. Damron, 1 Monr.,

<sup>40</sup> Harbison v. Houghton, 41 Ill., 235.

522.

<sup>43</sup> Moses v. Lewis, Jac., 502.

<sup>41</sup> Todd v. Pratt, 1 Har. & J., 465.

§ 427. **Rights of tenants; crops.** When an action of ejectment is brought against one who is employed merely as a clerk or agent of a tenant who is in the lawful occupancy of the premises, the judgment in ejectment obtained in such action is void as to the actual tenant, since he is not a party to the suit. He may, therefore, maintain a bill to enjoin the execution of a writ of possession under such judgment, since an action against the sheriff serving such writ might prove an inadequate remedy for the loss occasioned the tenant in being turned out of possession before the expiration of his lease, and for the loss of his crops.<sup>44</sup> But a plaintiff in ejectment, having no lien upon the crops grown by defendant upon the premises, is not entitled to an injunction *pendente lite* to restrain defendant from selling or disposing of such crops.<sup>45</sup>

§ 428. **When plaintiff in ejectment allowed to proceed to trial.** If it is apparent in an action to enjoin a suit in ejectment that there is no defense to the suit at law, complainant's rights being only equitable, plaintiff in ejectment will ordinarily be permitted to proceed as far as trial and judgment, since it is inequitable to delay him in the assertion of his title any farther than is actually necessary for the protection of complainant's equities.<sup>46</sup> And a court of equity will not, upon an interlocutory motion in advance of the final hearing, restrain a defendant from setting up an outstanding term in defense of an action of ejectment brought by complainant to determine his title to the estate in controversy.<sup>47</sup> But the prosecution of an action of ejectment may be enjoined at the suit of one who is in possession under an equitable title, the title of plaintiff in ejectment being void and constituting a cloud upon complainant's title.<sup>48</sup> And the relief has been

<sup>44</sup> Stewart v. Pace, 30 Ark., 594.

<sup>47</sup> Barney v. Lockett, 1 Sim. &

<sup>45</sup> Walker v. Zorn, 50 Ga., 370.

St., 419; Northey v. Pearce, Ib.,

<sup>46</sup> Ham v. Schuyler, 2 Johns. Ch.,

420.

140; Douglass v. Walton, Freem. Ch., 347; Hill v. Billingsly, 53 Miss., 111. And see Wildy v. Bonny's Lessee, 35 Miss., 77.

<sup>48</sup> Michie v. Ellair, 54 Mich., 518, 20 N. W., 564. See also Apgar v. Christophers, 10 Fed., 857; Crellin v. Ely, 13 Fed., 420.

granted in behalf of the equitable owner, who has been in possession for many years claiming the fee, against persons claiming under a conveyance executed for the purpose of defrauding creditors.<sup>49</sup>

§ 429. **Death of defendant before answer.** Under the practice of the English Court of Chancery, when an injunction had been granted against an action of ejectment, and defendant died before answer, upon the application of the heir at law plaintiff in the injunction suit was required to revive the suit within a given time, in default of which the injunction would be dissolved.<sup>50</sup>

§ 429 *a*. **Writ of possession enjoined until compensation for improvements.** Where a statute provides that, after judgment in ejectment against the defendant, he may have an appraisal of the value of the improvements made by him, and that the successful party shall pay him the amount so found due, an injunction will lie to restrain the execution of a writ of possession until such payment is made.<sup>51</sup>

<sup>49</sup> McKibbin *v.* Bristol, 50 Mich., 319, 15 N. W., 491.

<sup>50</sup> Hill *v.* Hoare, 2 Cox, 50.

<sup>51</sup> Leighton *v.* Young, 3 C. C. A., 176, 52 Fed., 439, 18 L. R. A., 266.

## VII. LANDLORD AND TENANT.

- § 430. Removal of crops by tenant.  
 431. When tenant allowed injunction.  
 432. Equity reluctant to enjoin proceedings for eviction; illustrations.  
 433. Removal of fixtures and furniture.  
 434. Waste by tenant enjoined.  
 435. Nuisance by tenant enjoined.  
 436. Restrictive covenants in leases, breach enjoined.  
 437. Right to estovers.

§ 430. **Removal of crops by tenant.** The preventive jurisdiction of equity by injunction is frequently invoked as between landlord and tenant for the better protection of their relative rights in the demised premises. And an examination of the authorities bearing upon this branch of the subject discloses a somewhat liberal exercise of the jurisdiction for the prevention of waste by the tenant, or his improper removal of the produce or crops grown upon the premises, in cases where the legal remedies are inadequate to the proper protection of the rights of the landlord.<sup>1</sup> Thus, a tenant of premises demised from year to year may be enjoined from removing crops, straw and manure when such removal is contrary to the custom of the country.<sup>2</sup> So a tenant may be enjoined from disposing of his landlord's cattle upon the premises without consent of the landlord.<sup>3</sup> And where a tenant from year to year on the expiration of his lease proceeds, contrary to the custom of the country, to remove hay, straw, fodder and other articles, the

<sup>1</sup> See *Walton v. Johnson*, 15 72; *Douglass v. Wiggins*, 1 Johns. Sim., 352; *Pulteney v. Shelton*, 5 Ch., 435; *Thomas v. Jones*, 1 Y. & Ves., 147; *Onslow v. —*, 16 Ves., 173; *Pratt v. Brett*, 2 Madd., 62; *C. C. C.*, 510; *Lewis v. Christian*, 40 Ga., 187; *Parker v. Garrison*, 61 Ill., 250.  
<sup>2</sup> *Pulteney v. Shelton*, 5 Ves., 147; *Onslow v. —*, 16 Ves., 173; *Pratt v. Brett*, 2 Madd., 62.  
<sup>3</sup> *Musser v. Brink*, 80 Mo., 350.



produce of the land, a decree in equity having already appointed a receiver of the rents and profits of the estate, a peremptory injunction may be issued to restrain such removal by the tenant, although he was not a party to the proceedings in equity and no bill has been filed against him.<sup>4</sup> But a lessee will not be restrained from removing crops out of which he is by the terms of his contract to pay the rent in kind, there being no averment that the lessee is insolvent, or that he is without other property out of which an execution might be satisfied.<sup>5</sup> The rule is otherwise, however, in case of the insolvency of the tenant,<sup>6</sup> and in such case the injunction will be allowed to prevent the removal and sale of the crop out of which the rent is payable, and to prevent purchasers from paying the tenant therefor, the relief being granted in such case because of the inadequacy of the remedy at law.<sup>7</sup> And tenants of real estate on shares, who by their bad management have caused great loss to the owner, and who are insolvent, may be restrained from removing their share of the crops from the premises until the damages sustained by the owner can be ascertained, the insolvency of the defendants rendering the remedy at law less efficacious than that in equity.<sup>8</sup> But one who has merely a naked right to the possession of real estate, without any legal interest therein, as an administrator, will not be allowed to enjoin the person in possession of the premises from disposing of the crops which he has raised thereon, the beneficial interest being wholly in him against whom the restraining power of the court is sought to be exercised.<sup>9</sup>

§ 431. **When tenant allowed injunction.** The jurisdiction of equity by injunction is also invoked for the protection of

<sup>4</sup> *Walton v. Johnson*, 15 Sim., 352.

<sup>7</sup> *Parker v. Garrison*, 61 Ill., 250.

<sup>5</sup> *Gregory v. Hay*, 3 Cal., 332; *Williams v. Green*, 37 Ga., 37.

<sup>8</sup> *Lewis v. Christian*, 40 Ga., 187.

<sup>9</sup> *Converse v. Ketchum*, 18 Wis., 202.

<sup>6</sup> *Schmitt v. Cassilius*, 31 Minn., 7, 16 N. W., 453.

the rights of tenants. While, however, it is held that equity has jurisdiction at the suit of a tenant to prevent the landlord from breaking a covenant which, though not made with the tenant, will, if broken, work a forfeiture of the lease, yet where a plain construction of the covenant does not warrant the interpretation put upon it by complainant, the relief will not be granted.<sup>10</sup> Nor will proceedings by a lessor to recover possession of his property demised under a lease from year to year be enjoined on the ground that the lessee has made valuable improvements which will be lost to him in case of his dispossession.<sup>11</sup> But an injunction has been granted until the hearing to prevent the eviction of the tenant for non-payment of rent, upon a bill for an accounting between the tenant and landlord concerning usury alleged to have been extorted by the latter in making the lease, the tenant offering to pay the amount actually due.<sup>12</sup> And where the owner of premises has instituted proceedings for the removal of his tenants, he may be enjoined, pending such proceedings, from interfering with the rights of the tenants by threats and menaces and by driving away their employees, the bill averring his total insolvency.<sup>13</sup> So when the title to real estate is being litigated by a proceeding in equity to set aside a sale upon the ground of fraud, the defendant in that litigation may be restrained from instituting proceedings before a justice of the peace upon a landlord's warrant to recover possession of the premises. In such a case relief by injunction is regarded as necessary for the prevention of a multiplicity of suits, all matters in controversy being susceptible of determination in the original suit in equity.<sup>14</sup> And a mandatory injunction is an appropriate remedy where a landlord has wrongfully turned off his tenant's supply of water.<sup>15</sup>

<sup>10</sup> *Rogers v. Danforth*, 1 Stockt., 289.

<sup>13</sup> *Walker v. Walker*, 51 Ga., 22.

<sup>11</sup> *West v. Flannagan*, 4 Md., 36.

<sup>14</sup> *Damschroeder v. Thias*, 51 Mo., 100.

<sup>12</sup> *Spence v. Steadman*, 49 Ga., 133.

<sup>15</sup> *Brauns v. Glesige*, 130 Ind., 167, 29 N. E., 1061.

§ 432. **Equity reluctant to enjoin proceedings for eviction; illustrations.** The doctrine as thus discussed and the authorities to which reference has been made in its support indicate the marked reluctance with which courts of equity interfere by injunction with legal proceedings instituted by a landlord for the eviction of the tenant in conformity with the accustomed procedure for such purpose, and in the absence of any elements of fraud, or other special equities warranting the relief. And it may be said, generally, that in the absence of any special circumstances, such as those above enumerated, upon which the jurisdiction of equity may attach, an injunction will not lie to restrain legal proceedings instituted by the landlord for the eviction of the tenant or for the non-payment of rent, all such questions being properly determinable in the usual course of proceedings at law.<sup>16</sup> Equity will not, therefore, enjoin a landlord from distraining for rent due from his tenant upon the ground of a breach of contract by the landlord in failing to defend an action for the enforcement of a mechanic's lien against the demised premises, by means of which failure the tenant claims damages, since the remedy at law for such a breach of contract is ample.<sup>17</sup> And where a statute prohibits the staying of proceedings in an application by a landlord for the removal of a tenant, such proceedings will not be enjoined in the absence of fraud or collusion, and the tenant will be left to assert his right to possession in the proceeding for removal.<sup>18</sup> Nor does the destruction of the demised premises by fire afford sufficient ground for restraining proceedings for the recovery of rent, when the lease contains no provision for the suspension of rent in the event of fire.<sup>19</sup> And in an action by the tenant to restrain his landlord from

<sup>16</sup> *Sherman v. Wright*, 49 N. Y., 227; *Leopold v. Judson*, 75 Ill., 536; *Hall v. Holmes*, 42 Ga., 179; *Huff v. Markham*, 70 Ga., 284.

<sup>17</sup> *Leopold v. Judson*, 75 Ill., 536.

<sup>18</sup> *Sherman v. Wright*, 49 N. Y., 227.

<sup>19</sup> *Leeds v. Cheetham*, 1 Sim., 146.

tearing down the premises, to the injury of the tenant in his business, it has been held sufficient ground for refusing relief that the tenant did not aver performance of the covenants and conditions incumbent upon him by the terms of the lease.<sup>20</sup> So, upon the other hand, relief by injunction will be denied the landlord in cases where full redress may be had at law. And the fact of a tenant holding over after the expiration of his lease will not warrant relief in equity by injunction, when no reason is shown why resort is not had to the legal remedy by forcible detainer or ejectment, and equity will not interfere in such case by injunction to determine the rights and titles of the parties, but will leave them to be determined at law.<sup>21</sup>

§ 433. **Removal of fixtures and furniture.** The question of relief by injunction to prevent the removal of fixtures from the demised premises is to be determined by the test so frequently applicable in determining whether preventive relief shall be granted, namely, the adequacy of the remedy at law. And when the controversy is between the owner of the premises and an outgoing tenant, or one claiming under him, a court of equity will not entertain jurisdiction to restrain the removal of fixtures, since in such case the remedy at law is regarded as ample.<sup>22</sup> Upon the other hand, the court may properly enjoin the removal of fixtures from the premises upon a bill by the landlord alleging a threatened sale by the sheriff under execution against the tenant, such an injury being of an irreparable character and partaking of the nature of waste.<sup>23</sup> So where a tenant has built a substantial addition to the rear of the demised premises which has become part of the reality and which can not be removed without serious injury to the building by leaving it open to the elements, the threatened re-

<sup>20</sup> Johnston v. Glenn, 40 Md., 200.

<sup>22</sup> Hamilton v. Stewart, 59 Ill.,

<sup>21</sup> Torrent v. Muskegon Booming  
Co., 22 Mich., 354.

330.

<sup>23</sup> Richardson v. Ardley, 38 L. J.  
Ch. N. S., 508.

removal of the structure by the tenant will be enjoined.<sup>24</sup> And where fixtures have been installed by a tenant upon which a balance remains due for the work of installation, the landlord may enjoin the removal of such fixtures by the claimant where the damages would be difficult of ascertainment and the legal remedy is consequently inadequate.<sup>25</sup> So in an action against an infant to set aside a lease of a furnished house which he had obtained under false representations that he was of lawful age, it has been held proper on setting aside such lease to enjoin the infant from selling or parting with the furniture.<sup>26</sup>

§ 434. **Waste by tenant enjoined.** The commission of waste by the tenant upon the premises demised is also sufficient ground for invoking the extraordinary aid of equity by injunction, whether such waste consists in an actual abuse or misuse of the premises, or in their conversion to uses repugnant to the terms of the lease.<sup>27</sup> Thus, the cutting of a hole by the tenant through the ceiling or roof of the demised premises, for the purpose of constructing a chimney, constitutes such waste as to entitle the landlord to an injunction.<sup>28</sup> And a ground landlord is entitled to the aid of equity by injunction to prevent an under-tenant from committing waste.<sup>29</sup> So the sowing of land with hurtful and injurious crops is regarded as such an act of waste as to justify relief by injunction.<sup>30</sup> And upon analogous principles the lessor may restrain his lessee, or those claiming under him or acting by his authority, from converting the demised premises to such uses as are inconsistent with

<sup>24</sup> *Fortescue v. Bowler*, 55 N. J. Eq., 741, 38 Atl., 445.

<sup>25</sup> *Camp v. Chas. Thatcher Co.*, 75 Conn., 165, 52 Atl., 952.

<sup>26</sup> *Lempiere v. Lange*, 12 Ch. D., 675.

<sup>27</sup> *Farrant v. Lovel*, 3 Atk., 723; *Baughner v. Crane*, 27 Md., 36; *Steward v. Winters*, 4 Sandf. Ch.,

587; *Maddox v. White*, 4 Md., 72; *Douglass v. Wiggins*, 1 Johns. Ch.,

435; *Brock v. Dole*, 66 Wis., 142, 28 N. W., 334.

<sup>28</sup> *Brock v. Dole*, 66 Wis., 142, 28 N. W., 334.

<sup>29</sup> *Farrant v. Lovel*, 3 Atk., 723.

<sup>30</sup> *Pratt v. Brett*, 2 Madd., 62.



the terms of the lease, and as are likely to result in such injury to the owner's rights as can not be adequately compensated by proceedings at law.<sup>31</sup> But a landlord who is not entitled to the reversion will not be allowed an injunction against the commission of waste by the removal from the premises of a building erected by the tenant.<sup>32</sup> Nor will equity interfere by injunction against a lessee in possession, who is using the premises in accordance with the terms of the lease, working no destruction or injury to the reversion other than that contemplated and authorized by the lease itself.<sup>33</sup> And defendant in possession claiming as lessee will not be enjoined from using the premises for purposes not illegal, upon the ground that complainant has not authorized the lease, but complainant will be left to his legal remedy to recover possession.<sup>34</sup>

§ 435. **Nuisance by tenant enjoined.** It is also a fitting exercise of that branch of the jurisdiction under discussion to interfere for the prevention of such acts by the tenant with reference to the demised premises as amount to a nuisance. Thus, lessees of a building who have rented upon representations to the lessor that they desired the building for occupancy as a private dwelling may be enjoined from altering it in such manner as to carry on the business of coach making, the house being in danger of falling from such alterations.<sup>35</sup> And where the lessees of a bridge use it in a manner expressly forbidden by the terms of their lease, to the great injury of the lessors in the rights retained by them, an appropriate case for an injunction is presented, the relief being extended in such case upon the ground that the lessees are

<sup>31</sup> *Steward v. Winters*, 4 Sandf. Ch., 587; *Maddox v. White*, 4 Md., 72; *Douglass v. Wiggins*, 1 Johns. Ch., 435. See also *Frank v. Brunemann*, 8 West Va., 462; *Baugh v. Crane*, 27 Md., 36.

<sup>32</sup> *Perrine v. Marsden*, 34 Cal., 14.

<sup>33</sup> *McDaniel v. Callan*, 75 Ala., 327.

<sup>34</sup> *Bodwell v. Crawford*, 26 Kan., 292.

<sup>35</sup> *Bonnett v. Sdaler*, 14 Ves., 526.

guilty of maintaining a continuing nuisance.<sup>36</sup> But an injunction has been refused which was sought to restrain lessees from the erection of works whereby water would be drawn off and used in a manner different from that specified in the lease.<sup>37</sup> So it is held that the lessor can not, during the continuance of the lease, enjoin his lessee from darkening windows and obstructing light in the demised premises, when it is not shown that the injury is not susceptible of compensation in an action for damages.<sup>38</sup> So a landlord can not enjoin his tenant from cutting openings in floors alleged to be contrary to the provisions of the lease, where no substantial injury results and complainant has an adequate remedy for breach of contract or by termination of the lease if the acts of the defendant are in violation of its terms.<sup>39</sup>

§ 436. **Restrictive covenants in leases, breach enjoined.** The preventive jurisdiction of equity is also freely exercised for the prevention of the violation of negative or restrictive covenants annexed to leases, and thus, in effect, enforcing as against the tenant a specific performance of the contract for the benefit of the lessor. The subject is fully considered elsewhere in this treatise, and it is not proposed to state here the principles in detail which control in the exercise of the jurisdiction in this class of cases, or to present the various illustrations afforded by the reported decisions of the application of those principles to the cases as they occur in practice. It is sufficient to say in general terms that whenever, under the terms of a lease, the lessee is restricted to the use of the demised premises in a particular manner or for a specified purpose, a violation of the covenant by the use of the premises in a different manner or for another purpose affords ground for the interposition of equity by injunction. And in all

<sup>36</sup> *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb., 212. following *Ingraham v. Dunnell*, 5 Met., 118.

<sup>37</sup> *Society v. Butler*, 1 Beas., 499, reversing S. C., 1b., 264.

<sup>39</sup> *Browne v. Niles*, 165 Mass., 276, 43 N. E., 90.

<sup>38</sup> *Atkins v. Chilson*, 7 Met., 398,

such cases a court of equity is regarded as the appropriate forum for administering relief, the jurisdiction being based in part upon principles analogous to those which govern the equitable remedy of specific performance, and in part upon the necessity of preventing a constantly recurring grievance resulting from the continuous breach of the covenant, which can not be adequately compensated by an action for damages.<sup>40</sup>

§ 437. **Right to estovers.** Pending a trial at law to determine the right to estovers, an injunction may be allowed to prevent their use until the right shall be adjusted, the relief being extended in such case upon principles analogous to those governing in cases of waste. Thus, where one claims the right to estovers in the real estate of another, but the question has been decided against him in one action at law, and another action is still pending to determine the right, he may be enjoined from taking estovers. The jurisdiction under such circumstances rests on the necessity of avoiding a multiplicity of suits and of preventing further depredations upon the estate until the right can be fully determined at law.<sup>41</sup>

<sup>40</sup> See for a full discussion of injunctions against the Breach of this subject, chapter XIX, *post*, Negative Contracts."

"Of Injunctions Pertaining to Contracts," subdivision III, "Of Injunctions," Johns. Ch., 497. <sup>41</sup> *Livingston v. Livingston*, 6

## VIII. HOMESTEADS.

- § 438. Sale of homestead under execution may be enjoined.  
439. Limitations upon the rule.  
440. Further limitations.  
441. Exemption under "Homestead Act" of Congress.

§ 438. **Sale of homestead under execution may be enjoined.** Questions of much practical importance have frequently arisen under the legislation of the different states exempting from execution real estate which is occupied as a homestead by a judgment debtor, as to the right of the debtor to protection in equity against a sale of his homestead interest under judicial process. While, as will be seen, the courts have in some instances preferred to remit the judgment debtor to the ordinary legal remedies, they have generally inclined favorably to the exercise of their preventive jurisdiction in these cases. Regarding the sale of the homestead interest as operating as a cloud upon the title and the legal remedies being generally inadequate for the prevention of such grievance, relief in equity has been freely extended for the purpose of preventing an enforced sale under execution of premises in the actual occupancy of the debtor as a homestead, and which are protected from levy and sale under the homestead exemption laws of the state.<sup>1</sup> And an interlocutory injunction may be allowed to restrain a sale of lands in satisfaction of a judgment when complainant, the judgment debtor, claims a home-

<sup>1</sup> *Tucker v. Kenniston*, 47 N. H., 267; *Irwin v. Lewis*, 50 Miss., 363; *Judd v. Hatch*, 31 Iowa, 491; *Johnson v. Griffin Banking and Trust Co.*, 55 Ga., 691; *Brown, Adm'r, v. Thornton*, 47 Ga., 474; *Colley v. Duncan*, 47 Ga., 668; *Lewton v. Hower*, 18 Fla., 872; *Gardner v. Douglass*, 64 Tex., 76; *Dascey v. Harris*, 65 Cal., 361, 4 Pac., 205; *Roth v. Insley*, 86 Cal., 134, 24 Pac., 853; *Robinson v. Hughes*, 117 Ind., 293, 20 N. E., 220; *Hyser v. Mansfield*, 72 Vt., 71, 47 Atl., 105; *Smith v. Zimmerman*, 85 Wis., 542, 55 N. W., 956; *Pierson v. Truax*, 15 Col., 223, 25 Pac., 183; *Webb v. Hayner*, 49 Fed., 601. See also *White v. Givens*, 29 La. An., 571; *Loeb v. McMahon*, 89 Ill., 487.

stead interest in the lands, and when it appears to the court for the best interests of all parties that the land should not be sold until a determination of the controversy as to the right of homestead.<sup>2</sup> So when an injunction is sought for the protection of the debtor's homestead from sale under execution, and the remedy at law is less adequate and complete than the remedy in equity, the relief may be granted until the case can be fully heard upon its merits.<sup>3</sup> So an injunction has been allowed *in limine* for the protection of minor heirs claiming a homestead right in real estate to prevent a purchaser under execution from taking possession until a full hearing could be had, and the rights of the minors be fully determined upon final decree.<sup>4</sup> And a sale of the homestead by an assignee in insolvency of the husband may be enjoined.<sup>5</sup>

§ 439. **Limitations upon the rule.** Equity will not, however, enjoin a sale of real property under execution which is claimed by the debtor as his homestead when the homestead right had not attached at the time of seizure.<sup>6</sup> And a sale under execution of an undivided interest in real estate will not be enjoined in behalf of the judgment debtor claiming the property as exempt from seizure under the homestead laws of the state, when the property levied upon is not susceptible of being a homestead, being only the debtor's share or interest in the lands owned by others jointly with him.<sup>7</sup> Nor will an injunction be granted in this class of cases, when full and complete relief may be had at law.<sup>8</sup> And upon a bill to enjoin a sale under execution of premises in the actual occupancy of the debtor as a homestead, it is not sufficient ground for relief to allege that complainant had tendered to the sheriff

<sup>2</sup> Johnson v. Griffin Banking and Trust Co., 55 Ga., 691.

<sup>3</sup> Brown, Adm'r, v. Thornton, 47 Ga., 474.

<sup>4</sup> Colley v. Duncan, 47 Ga., 668.

<sup>5</sup> Dascey v. Harris, 65 Cal., 361,

4 Pac., 205.

<sup>6</sup> Borron v. Sollibellos, 28 La. An., 355.

<sup>7</sup> Henderson v. Hoy, 26 La. An., 156.

<sup>8</sup> Lowry v. Williams, 47 Ga., 387.



other property upon which to levy the execution, when it is not shown that such other property was that of the defendant in execution.<sup>9</sup>

§ 440. **Further limitations.** The homestead right being regarded as only a right pertaining to the occupancy of the premises, the exemption from sale attaches only while the premises are actually occupied as a homestead, and equity will not interfere by injunction to prevent a sale of the property after the occupancy has ceased. A judgment creditor having a lien upon the lands of the debtor subject to the homestead rights of the latter may, therefore, when the debtor has transferred his homestead to a third person, enforce his judgment by execution and sale of the premises so conveyed, and no relief by injunction will be allowed to prevent such sale.<sup>10</sup> So the relief will not be allowed to restrain a sale of the premises under a valid lien created prior to their occupancy as a homestead. Thus, an injunction will be refused which is sought to restrain a sale under a deed of trust of real estate claimed by the wife as a homestead, when the premises were not so used or occupied at the time of the execution of the deed of trust. And the fact, in such case, that after the execution of the deed of trust the premises are improved in part with the funds of the wife, and with the knowledge of the beneficiaries under the deed of trust, and are then occupied as a homestead, will not warrant an injunction against the sale.<sup>11</sup> And since the assignment of a homestead estate in realty can neither create any superior right, nor divest any equities or liens upon the estate, an injunction will not be granted upon the application of one member of a partnership to restrain an assignment by

<sup>9</sup> *Alexander v. Mullen*, 42 Ind., 398.

<sup>10</sup> *Moore v. Granger*, 30 Ark., 574. In *Van Ratcliff v. Call*, 72 Tex., 491, 10 S. W., 578, the contrary doctrine was laid down. Considering, however, the true nature of a home-

stead as a mere personal right of occupancy and not as an interest or estate which can be conveyed, the decision in this case can hardly be sustained upon principle.

<sup>11</sup> *Chipman v. McKinney*, 41 Tex., 76.

a copartner to his wife of his homestead interest in real estate which is alleged to be subject to the copartnership debts.<sup>12</sup>

§ 441. **Exemption under "Homestead Act" of Congress.** Notwithstanding the doctrine as above stated denying relief against a sale of the homestead premises after a sale or transfer by the debtor, when such sale is made under a judgment which was a valid lien upon the premises, subject to the homestead interest before the transfer, a different rule prevails when the land in question is, under the law creating the exemption, absolutely exempted from the satisfaction of all prior debts, so that no lien could attach to the land on account of such debts. And where, under the act of Congress known as the "Homestead Act,"<sup>13</sup> one has entered upon and obtained title to lands, which are exempt under the act from the satisfaction of any debts contracted prior to the issuing of the patent, a subsequent purchaser of the land may enjoin the levy of an execution thereon in satisfaction of a demand which accrued before the issuing of the patent. In such case it is held that Congress, having the exclusive power under the constitution to dispose of the public lands, may dispose of them subject to such conditions and limitations as it sees fit to impose, and the condition thus imposed will be enforced by injunction for the protection of a subsequent purchaser.<sup>14</sup>

<sup>12</sup> *Newton v. Summey*, 59 Ga., § 2296; 2 U. S. Comp. Stat. 1901, 397. p. 1398.

<sup>13</sup> Act of Congress approved May 20, 1862, U. S. Revised Statutes, <sup>14</sup> *Miller v. Little*, 47 Cal., 348.

## CHAPTER VII.

### OF INJUNCTIONS PERTAINING TO MORTGAGES.

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#### I. INJUNCTIONS IN BEHALF OF MORTGAGORS.

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§ 442. **When sale under mortgage enjoined.** The preventive aid of equity by injunction is frequently invoked in behalf of mortgagors of real property for the purpose of preventing a sale of the mortgaged premises under circumstances of great hardship or irreparable injury. And while courts of equity

are averse to interference with the legal rights of a mortgagee, or with the ordinary remedies for the enforcement of those rights, they will sometimes interfere by injunction to restrain proceedings under a sale of mortgaged premises where such proceedings are against conscience and threaten irreparable injury.<sup>1</sup> Thus, where there is a dispute concerning the title to real estate which has been mortgaged to secure the purchase money, a sale of the property to satisfy the mortgage may be enjoined if its enforcement would be against conscience and fair dealing and would entail great loss on the mortgagors.<sup>2</sup> So a temporary injunction has been awarded against a sale of mortgaged premises under a power of sale contained in the mortgage of which complainant, the assignee of the mortgagor, was ignorant when he purchased the premises, the mortgage never having been recorded.<sup>3</sup> And where property has been released from the terms of a mortgage, but, notwithstanding such release, it is afterward sold under a decree in foreclosure, a perpetual injunction may be allowed against proceedings at law to recover possession under such sale.<sup>4</sup> So equity will enjoin a sale under a power where it appears that the mortgage was without consideration and did not secure any indebtedness, even though it was executed by plaintiff for the purpose of defrauding his creditors.<sup>5</sup> And it has been held that a sale under a mortgage given to secure the performance of an illegal contract may be enjoined.<sup>6</sup>

<sup>1</sup> *High Mfg. Co. v. Grier*, 4 *Jones Eq.*, 132; *Pierson v. Ryerson*, 1 *McCart.*, 181; *Platt v. McClure*, 3 *Woodb. & M.*, 151; *McCalley v. Otey*, 90 *Ala.*, 302, 8 *So.*, 157. See *Brown v. Cherry*, 56 *Barb.*, 635; *S. C.*, 38 *How. Pr.*, 352.

As to the terms upon which an injunction may be granted to restrain a sale by a mortgagee, who was the solicitor of the mortgagor at the time of making the mort-

gage, see *Macleod v. Jones*, 24 *Ch. D.*, 289.

<sup>2</sup> *High Mfg. Co. v. Grier*, 4 *Jones Eq.*, 132.

<sup>3</sup> *Platt v. McClure*, 3 *Woodb. & M.*, 151.

<sup>4</sup> *Pierson v. Ryerson*, 1 *McCart.*, 181.

<sup>5</sup> *Devlin v. Quigg*, 44 *Minn.*, 534, 47 *N. W.*, 258, 10 *L. R. A.*, 665.

<sup>6</sup> *Basket v. Moss*, 115 *N. C.*, 448, 20 *S. E.*, 733, 48 *L. R. A.*, 842, 44 *Am. St. Rep.*, 463.

§ 443. **Tender of amount due; caveat emptor.** But a sale of property under a deed of trust will not be enjoined when complainant admits by his bill that a portion of the debt secured by the deed of trust is justly due, but makes no tender of such amount. He who would have equity must first do equity, and in the absence of any offer on the part of the complainant to pay the amount which he admits to be due, he is entitled to no consideration in a court of equity.<sup>7</sup> And where it is sought to restrain a sale of land under a deed of trust on the ground that the deed was executed to secure the payment of a portion of the purchase money of certain personal property purchased by complainant under a false impression as to its character and value, there being no allegations of warranty or of false and fraudulent representations in the original bargain, it is held that an injunction will not lie. The doctrine of *caveat emptor* applies to such a sale, and in the absence of fraud and deceit the purchaser is not entitled to relief in equity.<sup>8</sup>

§ 444. **Conditions necessary to relief.** It may be asserted as a general rule that equity will not interfere by injunction to prevent the foreclosure of a mortgage unless it is shown that great and irreparable injury is likely to result, or unless complainant shows himself entitled to more speedy relief than may be had by the slower process of courts of law.<sup>9</sup> Nor will proceedings under a foreclosure decree be restrained upon grounds which might have been urged in defense of the foreclosure suit.<sup>10</sup> And to warrant the exercise of the jurisdiction mere general statements or opinions of complainant as to the injury likely to ensue if the proceedings are left unrestrained will not suffice; facts must be stated and not conclusions or

<sup>7</sup> Stringham v. Brown, 7 Iowa, 33; Sloan v. Coolbaugh, 10 Iowa, 31; Casady v. Bosler, 11 Iowa, 242. And see McCulla v. Beadleston, 17 R. I., 20, 20 Atl., 11.

<sup>8</sup> Street v. Rider, 14 Iowa, 506.

<sup>9</sup> Montgomery v. McEwen, 9 Minn., 103. See also Security Loan Association v. Lake, 69 Ala., 456.

<sup>10</sup> Board of Education v. Franklin, 61 Ga., 303.



inferences from those facts.<sup>11</sup> Thus, a general allegation in the bill that the foreclosure would materially injure and embarrass complainant in his right is not sufficient to warrant the relief.<sup>12</sup> Nor is it sufficient to allege that complainant does not owe the note described in the mortgage, but he must set forth specifically the equities upon which he relies to enjoin the sale.<sup>13</sup> So it is held that the fact that notes secured by a deed of trust are in suit, and that their validity is questioned, does not warrant an injunction against sale under the deed of trust.<sup>14</sup> And the fact that the mortgagor has unliquidated demands against the mortgagee which he desire to set off against the indebtedness secured by the mortgage will not warrant an injunction against a sale under a power contained in the mortgage, since the rule is regarded as well settled that unliquidated damages can not be pleaded by way of set-off to proceedings in equity.<sup>15</sup>

§ 445. **Payment of mortgage debt ground for injunction.** Payment of the mortgage indebtedness affords frequent ground of application for preventive relief against a threatened sale or foreclosure of the mortgaged premises. And while it has been held that payment does not of itself warrant an injunction against a sale under the mortgage, when there is no allegation of the mortgagee's insolvency, or of some other matter bringing the case within some recognized head of equity jurisdiction,<sup>16</sup> yet the better doctrine and that having the clear

<sup>11</sup> *Foster v. Reynolds*, 38 Mo., 553; *Montgomery v. McEwen*, 9 Minn., 103.

<sup>12</sup> *Montgomery v. McEwen*, 9 Minn., 103. And it is held in this case that the fact that the acts complained of would, if allowed to proceed, result in clouding complainant's title will not authorize an injunction. But upon this point the case appears to be overruled by *Conkey v. Dike*, 17 Minn., 457.

<sup>13</sup> *Foster v. Reynolds*, 38 Mo., 553.

<sup>14</sup> *Gibson's Heirs v. Niblett*, Sm. & M. Ch., 278.

<sup>15</sup> *Frieze v. Chapin*, 2 R. I., 429. And see *Robertson v. Hogsheads*, 3 Leigh, 667; *Koger v. Kane*, 5 Leigh, 606; *McCulla v. Beadleston*, 17 R. I., 20, 20 Atl., 11.

<sup>16</sup> *Waterman v. Johnson*, 49 Mo., 410.

weight of authority undoubtedly is that a sale or foreclosure after the mortgage indebtedness has been paid or satisfied affords sufficient ground for equitable interference by injunction.<sup>17</sup> And a mortgagor who has paid the debt in full and who afterward conveys the premises with covenants of warranty may properly invoke the aid of equity to restrain proceedings by the mortgagee to foreclose the mortgage which has been satisfied, and he will not be required to wait until suit by his grantee upon the covenants of warranty before obtaining relief.<sup>18</sup> So it is proper to enjoin a sale of real estate under a deed of trust in the nature of a mortgage until the final hearing of the cause, upon a bill alleging payment of the indebtedness, when defendants admit part payment, and when no injury can result by continuing the injunction until the hearing, while great injury might result to complainant by permitting the sale.<sup>19</sup> And when a mortgagee in possession of the mortgaged premises has been fully paid, an injunction will lie to prevent him from ejecting tenants from the lands.<sup>20</sup> So upon a bill to redeem, the mortgagor, having tendered payment of the amount due, may restrain the mortgagee from proceedings at law for an eviction.<sup>21</sup> But in the case of a chattel mortgage it is held that payment does not warrant an injunction against foreclosure when the mortgagor is in possession, since such foreclosure would only constitute a trespass, for which adequate relief might be had at law.<sup>22</sup>

§ 446. **Parties to the action.** As regards the parties to the action in cases of this nature, it is held that when a bill is brought by an administrator to enjoin a sale of real estate

<sup>17</sup> Hubbard *v.* Jasinski, 46 Ill., 160; Dockrey *v.* French, 69 N. C., 308; Robinson *v.* Maguire, 9 Ir. Eq., 268; Pierson *v.* Ryerson, 1 McCart., 181. And see Greenwade *v.* McCormack, 79 Mo., 13.

<sup>18</sup> Hubbard *v.* Jasinski, 46 Ill., 160.

<sup>19</sup> Dockrey *v.* French, 69 N. C., 308.

<sup>20</sup> Robinson *v.* Maguire, 9 Ir. Eq., 268.

<sup>21</sup> Lindsay *v.* Matthews, 17 Fla., 575.

<sup>22</sup> Normandin *v.* Mackey, 38 Minn., 417.

under a deed of trust in the nature of a mortgage, upon the ground that the indebtedness had been paid by the intestate in his lifetime, the heirs are necessary parties, since they are the owners of the real estate and directly interested in the result of the controversy.<sup>23</sup>

§ 447. **Usury as ground for injunction.** Relief in equity is also granted against the foreclosure or sale of mortgaged premises upon the ground of usury in the indebtedness secured by the mortgage, and an injunction is regarded as the appropriate remedy in such cases until an accounting can be had of the amount of interest legally due.<sup>24</sup> And equity will enjoin proceedings for the foreclosure and sale of mortgaged premises under mortgages given to secure usurious interest, when complainant has paid the principal indebtedness with legal interest in full.<sup>25</sup> So when the amount due under the mortgage is unascertained, the bill alleging usury in the transaction, and an action is pending by the mortgagor against the mortgagees for damages incurred by reason of their failure to comply with their agreement as to the consideration for the mortgage, a proper case is presented for an injunction until the balance actually due under the mortgage can be properly determined by the court.<sup>26</sup> The mortgagor, however, will not be allowed to enjoin the enforcement of the mortgage upon the ground of usury when there is ample remedy at law.<sup>27</sup> Nor will a sale of mortgaged premises be enjoined upon the ground of usurious transactions between the original parties, as against a *bona fide* purchaser of the mortgage without notice of such usury.<sup>28</sup> And in conformity with the universal maxim of equity, that he who would have equity must first do equity, an injunction will not be granted against a sale of real estate

<sup>23</sup> *Stewart v. Jackson*, 8 West Va., 29.

<sup>24</sup> *Hooker v. Austin*, 41 Miss., 268.

717; *Waite v. Ballou*, 19 Kan., 601. See also *Purnell v. Vaughan*, 77 N. C., 268.

<sup>25</sup> *Waite v. Ballou*, 19 Kan., 601.

<sup>26</sup> *Purnell v. Vaughan*, 77 N. C.,

<sup>27</sup> *Alston v. Wheatley*, 47 Ga., 646.

<sup>28</sup> *Gantt v. Grindall*, 49 Md., 310.

under a mortgage because of usury, when the mortgagor does not pay or tender the principal indebtedness and the interest legally due.<sup>29</sup> But an important distinction is to be observed in the application of this rule between cases where the relief is sought against the mortgage as an entirety, and cases where it is only sought to enjoin the foreclosure as to the amount of the usurious interest. And while the doctrine is well established that in an action to annul or enjoin the enforcement of the instrument as an entirety, complainant must first tender payment of the amount legally due, it does not apply to an action to enjoin the foreclosure to the extent of the usury alone, without affecting the remainder of the debt. A bill, therefore, praying an injunction as against the usury only, is not demurrable because it does not tender the balance of the indebtedness.<sup>30</sup>

§ 448. **Accounting between mortgagor and mortgagee.** The state of the account between mortgagor and mortgagee is sometimes important in determining the necessity for preventive relief against a foreclosure. And when there have been long and complicated dealings between the parties, extending over a period of several years, and the mortgagor files a bill for an accounting, the mortgagee may be restrained from selling under a power of sale contained in the mortgage until the final hearing upon the accounting. In such a case, there being a controversy between the parties as to the amount actually due under the mortgage, it will not be determined upon affidavits on the motion for an injunction, but will be left until the hearing, and the injunction in the meantime will be retained.<sup>31</sup> And it is proper, in such cases, to grant the

<sup>29</sup> *Tooke v. Newman*, 75 Ill., 215; *Ivey v. Wood*, 97 Ga., 755, 25 S. E., 499.  
*Powell v. Hopkins*, 38 Md., 1;

*Walker v. Cockey*, 38 Md., 75; <sup>30</sup> *Haggerson v. Phillips*, 37 Wis., 364.  
*Manning v. Elliott*, 92 N. C., 48;

*Cook v. Patterson*, 103 N. C., 127, <sup>31</sup> *Capehart v. Biggs*, 77 N. C., 261; *Farmers S. & B. & L. Assn.*  
 9 S. E., 402; *Carver v. Brady*, 104 N. C., 219, 10 S. E., 565; *Brant- v. Kent*, 117 Ala., 624, 23 So., 757.

injunction upon condition that the mortgagor pay into court the amount which he admits to be due.<sup>32</sup> And a mortgagee who has sold property mortgaged to him as security for a note may be enjoined from proceeding upon his judgment until an accounting can be had between the parties.<sup>33</sup> But it is not sufficient ground for enjoining a sale of the premises to allege that complainant has made payments upon the mortgage indebtedness, that he has an unliquidated account against the holders of that indebtedness, and that complainant is advised that a less rate of interest than that claimed is actually due, when no dates, amounts or other data are alleged from which the court can form an opinion as to the real facts.<sup>34</sup>

§ 449. **Mistake of fact; deficiency in quantity of land.** A mistake of fact in the drafting of a mortgage, whereby it is made to embrace a larger quantity of land than was intended, would seem to be sufficient ground for enjoining a sale under the mortgage, until a final hearing can be had upon the question of its reformation.<sup>35</sup> And when a mortgage is given under a mutual mistake of both parties, the mistake being both as to the law and the facts, it is proper to enjoin a sale under the mortgage, and to retain such injunction until a hearing upon a bill to set aside the mortgage.<sup>36</sup> But equity will not enjoin a sale of lands under a deed of trust given to secure the purchase money, because of a deficiency in quantity, in the absence of any allegations of fraud or misrepresentation upon the part of the vendors, and in the absence of any averment of mutual mistake between the parties concerned.<sup>37</sup> And

See also *Purnell v. Vaughan*, 77 N. C., 268; *Craft v. Bullard, Sm. & M. Ch.*, 366; *Tillery v. Wrenn*, 86 N. C., 217; *Bridgers v. Morris*, 90 N. C., 32; *Gooch v. Vaughan*, 92 N. C., 610. See also *Hinson v. Brooks*, 67 Ala., 491.

<sup>32</sup> *Pritchard v. Sanderson*, 84 N. C., 299; *Harrison v. Bray*, 92 N. C., 488.

<sup>33</sup> *Craft v. Bullard, Sm. & M. Ch.*, 366.

<sup>34</sup> *Plowman v. Satterwhite*, 3 Tenn. Ch., 1.

<sup>35</sup> *Smith v. Mechanics Building & Loan Association*, 73 N. C., 372.

<sup>36</sup> *Ponton v. McAdoo*, 71 N. C., 101.

<sup>37</sup> *Reed v. Patterson*, 7 West Va., 263.



a purchaser of real estate who mortgages it back to his vendor to secure the purchase money can not enjoin the enforcement of the mortgage because of a deficiency in the amount of the real estate conveyed, when the conveyance is made by metes and bounds, since this method of description would control any expressions in regard to the measurement.<sup>38</sup>

§ 450. **Sale of equity of redemption; homestead.** The mortgagor's equity of redemption being peculiarly the result of the doctrines of equity, and never having been recognized by courts of law until forced upon their recognition by the place which had been given it in English jurisprudence by the High Court of Chancery, courts of equity have at all times manifested an extreme jealousy in protecting this equity. And for the purpose of better securing it to the mortgagor, the mortgagee may be restrained from proceeding at law to sell the equity of redemption in satisfaction of the mortgage debt.<sup>39</sup> But a sale of the mortgaged premises under a decree in foreclosure will not be enjoined upon the ground that the premises are occupied by the mortgagor as a homestead, when that defense was equally available to the mortgagor in the foreclosure proceeding, no fraud being shown in the conduct of the mortgagee, and no new matter being presented as ground for the relief.<sup>40</sup>

§ 451. **Insolvency of trustee; notice to mortgagor.** Insolvency of the trustee in a deed of trust in the nature of a mortgage is not, of itself, sufficient reason for enjoining him from selling under the power contained in the deed, since the court will presume, in the absence of evidence to the contrary, that the trustee will faithfully perform his trust.<sup>41</sup> But where the power of sale over mortgaged premises was in a trustee, who was proceeding to sell without having apprised the mortgagor of his intention, an injunction was granted to prevent the

<sup>38</sup> *Whitney v. Saloy*, 26 La. An., 40.

*Green Ch.*, 220; *Van Mater v. Conover*, 3 C. E. Green, 38.

<sup>39</sup> *Severns v. Woolston's Ex'rs*, 3

<sup>40</sup> *Michel v. Sammis*, 15 Fla., 308.

<sup>41</sup> *Tooke v. Newman*, 75 Ill., 215.

sale, upon the ground that it was the duty of the trustee to notify both parties of the sale, so that each might take steps to secure an advantageous sale.<sup>42</sup>

§ 452. **When relief refused; statute of limitations; remedy at law.** A sale under a trust deed will not be enjoined when it appears by complainant's own showing that no sale would be made if he should pay what he admits to be due, and what he avers his ability and willingness to pay.<sup>43</sup> Nor will a mortgagor be allowed an injunction against a sale under the mortgage, when it is admitted that the debt is due and unpaid, merely because of an adverse claim of title to the lands of which he was ignorant at the time of making the mortgage, and because such adverse claimant has brought an action to assert his title, by reason of which the mortgagor is embarrassed and prevented from paying the mortgage indebtedness.<sup>44</sup> And a sale of real estate under a deed of trust will not be restrained upon the ground that the note secured by the deed of trust is barred by the statute of limitations, the indebtedness being justly due, since he who would have equity must himself do equity.<sup>45</sup> Nor will such a sale be enjoined where the fact that the statute of limitations has run can be set up in defense to an ejectment suit brought by the purchaser at the mortgage sale, the mortgagor being in possession.<sup>46</sup>

§ 453. **Mortgagee not compelled by injunction to elect remedy; recovery of deficiency enjoined for fraud.** Since a

<sup>42</sup> Anon., 6 Madd., 1st American edition, 15. But it does not appear by the case as reported that the trustee was empowered by the terms of the instrument to sell without such notice.

<sup>43</sup> Shonk v. Knight, 12 West Va., 667.

<sup>44</sup> North Carolina G. A. Co. v. North Carolina O. D. Co., 73 N. C., 468.

<sup>45</sup> Goldfrank v. Young, 64 Tex., 432. As to the effect of a decree by consent of the parties dismissing a bill to enjoin a sale under a deed of trust, upon an application to enjoin such sale in a subsequent suit between the same parties, see Brower v. Buxton, 101 N. C., 419, 8 S. E., 116.

<sup>46</sup> Hutaff v. Adrian, 112 N. C., 259, 17 S. E., 78.

mortgagee has his election to pursue either the legal remedy for the enforcement of the debt, or the equitable remedy for the foreclosure of the mortgage, or both at the same time, he can not be compelled by injunction to elect which remedy he will adopt. Where, therefore, he holds a bond secured by mortgage, he will not be enjoined from proceeding at law upon the bond for the purpose of compelling him to resort to his remedy upon the mortgage.<sup>47</sup> Nor will a mortgagee be enjoined from suing at law upon the covenant for the money due, merely because he has exercised the power of sale contained in the mortgage to the extent of entering into a contract to sell a portion of the premises, which contract has not yet been consummated, even though the contract price is greater than the mortgage debt.<sup>48</sup> But fraudulent conduct on the part of the mortgagee, in preventing competition at a sale under foreclosure, may warrant an injunction against proceedings at law to recover a deficiency. Thus, when the parties interested in a foreclosure proceeding enter into a combination to prevent a sale at the usual competition to the highest bidder, and by their interference dissuade purchasers from bidding at the sale, they are estopped by such conduct from bringing an action for a deficiency due upon the sale, and may be enjoined from bringing such action.<sup>49</sup>

§ 454. **Unpropitious time of sale no ground for injunction.**

The fact that the time of sale of lands under a trust deed is unpropitious, that money is scarce, and that owing to the terms exacted the sale will be attended with great if not irreparable loss to the owner of the property, affords no ground for enjoining the sale.<sup>50</sup> And, in the absence of fraud or collusion on the part of the mortgagee, the mortgagor can not enjoin a sale under a power, upon the ground that the sale would be

<sup>47</sup> *Newbold v. Newbold*, 1 Del. Ch., 310.

<sup>49</sup> *Innes v. Stewart*, 36 Mich., 285.

<sup>48</sup> *Willes v. Levett*, 1 De G. & Sm., 392.

<sup>50</sup> *Muller v. Bayly*, 21 Gratt., 521;

*Caperton v. Landcraft*, 3 West Va., 540. And see *Miller v. Parker*, 73 N. C., 58.

unpropitious, or that it is to be made at an under-valuation.<sup>51</sup> And one who has pledged certain shares of stock with his stock brokers as collateral security for transactions between them, can not enjoin their sale upon mere general averments of irreparable injury, or because of the market for such stocks being unfavorable, in the absence of any averments of defendant's insolvency.<sup>52</sup> Nor does the fact that the sheriff has not yet made a report of sale in a proceeding for the foreclosure of a mortgage of itself constitute sufficient ground for enjoining defendant from moving to set aside the sale under the decree of foreclosure.<sup>53</sup>

§ 455. **Absolute conveyance, instead of mortgage, when sale enjoined.** Where the owner of real estate has been induced by fraud and undue influence to give an absolute conveyance of his property to one who has advanced him money, the owner intending only to give a mortgage or security for the money advanced, a court of equity will enjoin a sale of the premises by the grantee.<sup>54</sup>

§ 456. **Equity averse to enjoining sale under power.** Courts of equity are reluctant to interfere with the exercise of a power of sale conferred by the mortgagor, and unless such power is prohibited by law it will usually be permitted to be exercised in accordance with the agreement of the contracting parties. And where it was sought to enjoin in New York a sale of mortgaged premises in Colorado under a power contained in the mortgage authorizing a sale in the city of New York, an injunction was refused, upon the ground that, in the absence of any statutory prohibition, the parties to the mortgage might agree upon the power of sale. And although under the laws of New York no sale under such power could be allowed of real estate situated in that state, yet in the absence of any proof that a sale under the power was in conflict

<sup>51</sup> Warner v. Jacob, 20 Ch. D., 220.

<sup>53</sup> Rogers v. Holyoke, 14 Minn., 220.

<sup>52</sup> Park v. Musgrave, 2 Thomp. & C., 571.

<sup>54</sup> Peeler v. Barringer, Winston's Law and Eq., part second, 5.

with the laws of Colorado, the injunction was refused.<sup>55</sup> And the fact that the mortgagee threatens to sell the premises absolutely and without redemption does not warrant a court of equity in enjoining a foreclosure of the mortgage by advertisement under the power of sale.<sup>56</sup> Nor will a sale under power be enjoined merely because of hardship to the mortgagor, as where the mortgaged property considerably exceeds in value the amount of the debt.<sup>57</sup>

§ 457. **Sale under deed of trust to national bank enjoined.** A national bank incorporated under the act of Congress known as the national banking act, having no power under the act to accept real estate security for loans, it is held in Missouri that such security is absolutely void. And a deed of trust conveying real property as security for a loan due to a national bank, being thus treated as *ultra vires* and void, an injunction has been allowed to restrain a sale under such deed in satisfaction of the indebtedness.<sup>58</sup>

§ 458. **Garnishee proceedings against mortgagor.** The fact that judgment has been rendered against the mortgagor as garnishee in another county does not of itself constitute sufficient equity to warrant him in restraining mortgagees from the collection of the money by a sale of the mortgaged premises under a decree in foreclosure, and in the absence of any allegation that he has satisfied the judgment against him as garnishee he will not be allowed to enjoin proceedings under the decree.<sup>59</sup>

§ 459. **When perpetual injunction allowed in action of interpleader.** Where a contest arose between the assignor and assignee of a mortgage touching its ownership, and the mortgagor, upon a bill of interpleader to determine to whom the indebtedness should be paid, obtained an injunction against a

<sup>55</sup> *Carpenter v. Black Hawk Co.*,  
65 N. Y., 43.

<sup>56</sup> *Armstrong v. Sanford*, 7 Minn.,  
49.

<sup>57</sup> *McCulla v. Beadleston*, 17 R.  
I., 20, 20 Atl., 11.

<sup>58</sup> *Matthews v. Skinker*, 62 Mo.,  
329.

<sup>59</sup> *Dunham v. Collier*, 1 Greene  
(Iowa), 54.



sale of the premises under the mortgage and paid the money into court, and the court by its final decree determined to whom the money should be paid, it was held to be error to dissolve the injunction, and that it should have been made perpetual.<sup>60</sup>

§ 460. **General averments of misrepresentation by vendor insufficient.** Where it is sought by a purchaser of real estate to enjoin its sale under a deed of trust given as security for notes for the unpaid purchase money, mere general averments of misrepresentations by the vendor concerning the title are not sufficient to warrant the interposition of the court, when it is not shown that any actual deception was either intended or accomplished by the vendor.<sup>61</sup>

§ 461. **Dissolution of the injunction.** When the allegations of the bill upon which an injunction is obtained, restraining a sale of real estate under a deed of trust in the nature of a mortgage, are fully denied by defendant's answer, and are not supported by evidence upon the hearing, the injunction should be dissolved.<sup>62</sup> Where, however, it is necessary to ascertain the amount due from the debtor and for which the sale should be made, it is regarded as premature to dissolve an injunction restraining a sale under a deed of trust, although the grounds upon which it was granted are not maintained, and it should be retained until such amount is determined.<sup>63</sup>

§ 461 *a*. **Sale under chattel mortgage, when enjoined.** Upon a bill to enjoin a sale of chattels under a mortgage, the bill averring that the bonds secured by the mortgage were not lawfully issued and are invalid in the hands of the holders, the answer denying the averments of the bill only upon information and belief, it is proper to grant an interlocutory injunction until the rights of the parties can be fully heard and determined.<sup>64</sup>

<sup>60</sup> Gardner v. Hershey, 27 Ark., 552.

<sup>61</sup> Walker v. Burks, 48 Tex., 206.

<sup>62</sup> Arbuckle v. McClanahan, 6 West Va., 101.

<sup>63</sup> White v. Mechanics Building Fund Association, 22 Grat., 233.

<sup>64</sup> Carpenter v. Talbot, 33 Fed., 537. As to the right to enjoin a sale of goods under a chattel mortgage upon the ground that they are not covered by the mortgage, see Lanier v. Adams, 72 Grat., 145.

## II. INJUNCTIONS IN BEHALF OF MORTGAGEES.

- § 462. When junior mortgagee allowed injunction.  
463. Injunctions as between mortgagees and judgment creditors.  
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465. Transfer by mortgagor not enjoined when mortgage recorded.  
466. Effect of mistake or uncertainty.  
467. Creditors of mortgagor enjoined from levying upon crops.  
468. Mortgages of chattels.

§ 462. **When junior mortgagee allowed injunction.** The aid of equity by injunction is frequently invoked in behalf of junior mortgagees, for the purpose of protecting their rights in the mortgaged premises and for the preservation and security of their lien. And while the relief is rarely granted in behalf of a junior against a prior mortgagee to prevent the enforcement of the rights and equities of the latter under his prior mortgage, there are cases where an injunction is necessary to prevent a sale of the premises to the irreparable injury of the junior incumbrancer. For example, a junior mortgagee will be allowed to enjoin proceedings under a foreclosure whereby it is attempted to take subsequent advances to the prior mortgage so as to create a lien to the prejudice of the *puiusne* incumbrancer.<sup>1</sup> And since a junior mortgagee is entitled to redeem from a prior mortgagee and upon such redemption to be subrogated to his rights, upon a bill seeking such redemption and subrogation he may have an injunction against a sale or transfer of the judgment in foreclosure of the prior mortgage, having tendered the amount due upon the foreclosure. And an additional reason for the relief in such case is found in the fact that a sale under the foreclosure judgment under such circumstances would cast a cloud upon complainant's title.<sup>2</sup> But a subsequent mortgagee will not be allowed to enjoin a sale of the mortgaged premises under a prior

<sup>1</sup> Hughes v. Worley, 1 Bibb, 200.

<sup>2</sup> Dings v. Parshall, 7 Hun, 522.

incumbrance, when he refuses to redeem under such incumbrance and only seeks to hinder the sale.<sup>3</sup> And an additional ground for refusing the relief, under such circumstances, is found in the fact that the property is depreciating in value by lapse of time.<sup>4</sup> Nor will a subsequent mortgagee be permitted to enjoin a sale of the premises under a foreclosure of a prior mortgage, when he was made a party to such foreclosure proceedings and could have interposed his equities in defense of that action.<sup>5</sup>

§ 463. **Injunctions as between mortgagees and judgment creditors.** Relief by injunction is also granted as between mortgagees and judgment creditors of the mortgagor for the protection of the former in cases where they would otherwise be without adequate remedy for the protection of their mortgage lien. Thus, one who has a prior lien by way of mortgage upon real estate, which is also subject to the lien of a judgment subsequent to the mortgage, if the fact of such priority is not disclosed by the record, may have an injunction to prevent an attempted sale of the property under the judgment as the absolute property of the judgment debtor, free from any lien.<sup>6</sup> But a mortgagee can not enjoin a sale of the premises under a judgment subsequent to the mortgage, when it is not shown that the sale will not be made subject to the lien of the mortgage.<sup>7</sup> Nor is a mortgagee entitled to relief in such case upon the ground that the judgment creditor is asserting that plaintiff's mortgage and notes are fraudulent and void.<sup>8</sup> But the holder of the bonds of a railway company secured by a mortgage of its property, which is prior to the lien of a judgment against the company, is entitled to an injunction to prevent the enforcement of an execution against

<sup>3</sup> *Meysenburg v. Schlieper*, 46 Mo., 209. see *Wiedner v. Thompson*, 66 Iowa, 283, 23 N. W., 670.

<sup>4</sup> *Id.*

<sup>7</sup> *Ruthven Brothers v. Mast*, 55

<sup>5</sup> *Bloomington v. Barnard*, 7 Iowa, 715, 8 N. W., 659.  
*Hun*, 459.

<sup>8</sup> *Ramsdell v. T. W. P. Co.*, 84

<sup>6</sup> *Plumb v. Bay*, 18 Kan., 415. But *Iowa*, 484, 51 N. W., 245.

the property of the company under such judgment.<sup>9</sup> And a mortgagee whose lien is junior to that of a judgment creditor may have an injunction against a sale of the mortgaged premises under the prior judgment, upon a bill alleging that the judgment has been fully paid and is being fraudulently kept on foot to defeat the mortgagee's security. Such a case is regarded as affording strong ground for equitable relief, and is clearly distinguishable from the case of a mere general creditor, without lien or priority, who seeks to enjoin a transfer of his debtor's property.<sup>10</sup> So where a deed of trust is a valid and subsisting lien upon real estate, a court of equity may, in behalf of the trustee, enjoin a sale of the same premises under a judgment and execution to which the land is not subject.<sup>11</sup> But it is held in Louisiana that a mortgagee can not be allowed to enjoin a sale of the mortgaged premises under executions against the mortgagor, upon the ground of irregularity and illegality in the proceedings of the sheriff in making the sale; since if the sale be null, it can not affect the rights of the mortgagee: while if it be valid, he has a remedy at law to reach the proceeds of the sale.<sup>12</sup> Nor can a mortgagee enjoin a judicial sale of the property in satisfaction of debts of a higher rank and having preference over his mortgage, merely because he was not notified of the order of sale.<sup>13</sup>

§ 464. **Rents and profits pending foreclosure; when receiver and injunction allowed.** As regards the right to receive the rents and profits of the mortgaged premises pending a foreclosure, the mortgagor will not ordinarily be restrained before answer from receiving or collecting them.<sup>14</sup> But the rule is well established that inadequacy of the mortgaged premises

<sup>9</sup> *Butler v. Rahm*, 46 Md., 541.

<sup>12</sup> *James v. Breaux*, 26 La. An.,

<sup>10</sup> *Brigham v. White*, 44 Iowa, 245.  
677.

<sup>13</sup> *Wells v. Wells*, 25 La. An., 194.

<sup>11</sup> *Whitfield v. Clark*, 48 Ala.,  
555.

<sup>14</sup> *Oliver v. Decatur*, 4 Cranch C.  
C., 458.

as a security for the indebtedness, coupled with insolvency of the mortgagor, will warrant a court of equity in appointing a receiver over the mortgaged property and enjoining the mortgagor from any interference with such receiver or with the property.<sup>15</sup>

§ 465. **Transfer by mortgagor not enjoined when mortgage recorded.** While an injunction is sometimes necessary in aid of a suit for a foreclosure by the mortgagee, yet when the mortgage is duly recorded so that its lien can not be impaired by a subsequent transfer of the premises by the mortgagor, a court of equity will not in aid of a foreclosure enjoin the mortgagor from transferring his interest in the premises. And the relief is properly refused in such case, for the reason that, while an injunction might embarrass the mortgagor, it could not be of any advantage to the mortgagee.<sup>16</sup>

§ 466. **Effect of mistake or uncertainty.** Where through a mistake in the description a mortgage does not cover the entire premises intended to be conveyed, there is sufficient ground for invoking the protection of equity, and a purchaser at a foreclosure sale under the mortgage may enjoin the devisee of the mortgagor from proceeding in ejectment to recover that portion of the premises which was omitted.<sup>17</sup> So a sheriff may be enjoined from delivering a deed of premises sold by him by virtue of an execution in foreclosure proceedings when the execution by mistake has directed the sale of lands not included in the mortgage and not described in the bill.<sup>18</sup> And

<sup>15</sup> *Ruggles v. Southern Minnesota Railroad*, U. S. Circuit Court, District of Minnesota, 5 Chicago Legal News, 110. And see as to the right of the mortgagee to a receiver over the premises and to collect the rents pending his action for a foreclosure, *Quincy v. Cheeseman*, 4 Sandf. Ch., 405; *Brown v. Chase*, Walk. (Mich.), 43; *Hyman v. Kelly*, 1 Nev., 179; *Keep v.*

*Michigan Lake Shore R. Co.*, U. S. Circuit Court, Western District of Michigan, 6 Chicago Legal News, 101; *Hill v. Robertson*, 24 Miss., 338; *Sea Insurance Co. v. Stebbins*, 8 Paige, 565.

<sup>16</sup> *Breon v. Strelitz*, 48 Cal., 645.

<sup>17</sup> *Waldron v. Letson*, 2 McCart., 126.

<sup>18</sup> *Corles v. Lashley*, 2 McCart., 116.



where, in construing a mortgage, there is serious question as to whether certain machinery on the premises is included in it, a plain case is afforded for the interposition of equity to prevent the removal of the property; it being proper that the court should retain it within its jurisdiction until the question can be satisfactorily determined.<sup>19</sup>

§ 467. **Creditors of mortgagor enjoined from levying upon crops.** As regards the question of crops growing on the premises at the time of a sale under foreclosure, it is held that the doctrine of emblements does not apply, and that such crops properly belonged to the purchasers at the foreclosure sale. Equity will therefore restrain the creditors of the mortgagor from proceeding under an execution to levy upon such crops.<sup>20</sup> And mortgagees who have taken possession under their mortgage may enjoin one claiming under the mortgagor from removing crops which were growing upon the premises at the time of taking such possession.<sup>21</sup>

§ 468. **Mortgages of chattels.** Upon principles analogous to those which govern a court of equity in restraining the commission of waste by a mortgagor in possession in cases of real estate, a mortgagor of chattels may be restrained from moving the property beyond the reach of the mortgagee, or from placing it where it will not be forthcoming for the satisfaction of the debt.<sup>22</sup> So a mortgagee is entitled to an injunction, pending the foreclosure of a chattel mortgage, to prevent acts of waste which result in the destruction of the mortgaged chattels.<sup>23</sup> And a mortgagee of personal property, where by the terms of the mortgage possession is to be retained until condition broken, may enjoin proceedings against

<sup>19</sup> *Hutchison v. Johnson*, 3 Halst. Ch., 40.

<sup>22</sup> *Clagett v. Salmon*, 5 Gill & J., 314. See also *Valentine v. Washington*, 33 Ark., 795.

<sup>20</sup> *Crews v. Pendleton*, 1 Leigh, 297.

<sup>23</sup> *Schoonover v. Condon*, 12

<sup>21</sup> *Bagnall v. Villar*, 12 Ch. D., Wash., 475, 41 Pac., 195.  
812.

the property by other creditors.<sup>24</sup> While the principle is not disputed that the equity of redemption of a mortgagor of personal chattels in possession may be levied upon and sold in satisfaction of an execution against the mortgagor, yet a court of equity may by injunction restrain the exercise of this right where it will greatly impair, if not largely destroy, the rights of the mortgagee to the property in question.<sup>25</sup> But a mortgagee of chattels in possession has been refused an injunction to restrain their sale under execution against the mortgagor upon a judgment recovered after the execution of the mortgage, the chattels having no especial or peculiar value which could not be fully compensated in an action at law.<sup>26</sup> Nor can a mortgagee of chattels enjoin the mortgagor from disposing of them when adequate relief may be had at law by an action of replevin for their recovery.<sup>27</sup> So a junior mortgagee of chattels can not restrain their sale under a senior mortgage, upon the ground that a portion of the property is not covered by such senior mortgage, the remedy at law being ample in such case.<sup>28</sup> But a mortgagee of chattels may restrain the enforcement of a judgment of foreclosure upon the same chattels under a mortgage executed by the mortgagor to defraud his creditors, although complainant's mortgage is not yet due, and regardless of the solvency or insolvency of the mortgagor.<sup>29</sup>

<sup>24</sup> *Curd v. Wunder*, 5 Ohio St., 92.      <sup>25</sup> *Rankin v. Rankin*, 67 Iowa, 322, 25 N. W., 263.

<sup>26</sup> *Smithurst v. Edmunds*, 1 Mc-  
Cart., 408.

<sup>27</sup> *La Mothe v. Fink*, 8 Biss., 493.

<sup>28</sup> *Minnesota L. O. Co. v. Magin-*

*nis*, 32 Minn., 193, 20 N. W., 85.

<sup>29</sup> *McCormick v. Hartley*, 107

*Ind.*, 248, 6 N. E., 357.

## III. INJUNCTIONS CONCERNING THIRD PARTIES.

- § 469. Proceedings under mortgage enjoined to prevent cloud upon title.
470. Mortgagee of chattels refused injunction against sale under execution.
471. Relief as between judgment creditors and mortgagees.
472. Assignees of mortgagor; purchaser subject to mortgage.
473. Injunction denied where remedy at law.
474. Foreclosure not enjoined because of failure of title.
475. Tenants in common.
476. Foreign corporation not enjoined from mortgaging its property.
477. Bill of sale in nature of mortgage.

§ 469. **Proceedings under mortgage enjoined to prevent cloud upon title.** Under its well established jurisdiction for the prevention of a cloud upon the title to real property, equity may restrain proceedings under a mortgage which is found to be a cloud upon the title of complainant. And where, under a parol agreement for the conveyance of lands, complainant had entered upon the same, paid the purchase money and remained in possession, making valuable improvements, but before receiving his conveyance his vendor had mortgaged the premises to a third person, who took his mortgage with knowledge of complainant's rights, an injunction was allowed to restrain proceedings under the mortgage as being a cloud upon complainant's title.<sup>1</sup> So a sale under a mortgage in fraud of complainant's rights may be enjoined upon the ground of preventing a cloud upon title. Thus, where complainant requested his copartner to pay a mortgage for him and to charge it in account upon the firm books, and the latter did so, agreeing also to procure its release and discharge, but fraudulently and in violation of his agreement caused it to be assigned to defendant, it was held that a sale under the mortgage would be a fraud upon complainant's rights and a cloud upon his

<sup>1</sup> *Terry v. Rasell*, 32 Ark., 478.

title. It was, therefore, regarded as proper to enjoin such sale in an action for an accounting and for the cancellation of the mortgage and assignment.<sup>2</sup> So the owner of real estate may enjoin proceedings for the foreclosure of a void mortgage which constitutes a cloud upon his title.<sup>3</sup> And when, after the satisfaction and discharge of a mortgage, it is assigned and a foreclosure and sale are had by the assignee, a purchaser from the mortgagor, who was not a party to the foreclosure suit and who had no notice of it until after the decree, may maintain a bill to set aside the conveyance under the foreclosure and may enjoin defendants from conveying or interfering with the premises.<sup>4</sup> But one who purchases real estate subject to a mortgage, while entitled to enjoin its sale under the mortgage until the amount actually due may be determined, is not entitled to such injunction after the determination of the amount of the indebtedness.<sup>5</sup> And a sale of lands under a deed of trust will not be enjoined at the suit of one who is in possession claiming under a recorded legal title, when such title is superior to any which can be acquired by a purchaser at the sale, and when ample relief may be had at law against any assertion of title by such purchaser.<sup>6</sup>

§ 470. **Mortgagee of chattels refused injunction against sale under execution.** In the case of a mortgage of chattels, under which the mortgagee has taken possession with a view to selling the property in satisfaction of the debt, he is not entitled to an injunction to prevent a judicial sale of the chattels under execution against the mortgagor. In such case, the property having no especial or peculiar character or value, and its real money value being readily ascertainable, whatever damages may be sustained by the mortgagee by reason

<sup>2</sup> Conkey v. Dike, 17 Minn., 457.

<sup>3</sup> Yager v. Merkle, 26 Minn., 429,

<sup>4</sup> N. W., 819.

<sup>4</sup> Matheson v. Thompson, 20 Fla., 790.

<sup>5</sup> Osburn v. Andre, 58 Miss., 609.

And see this case as to the right of the purchaser to enjoin a sale of chattels under a mortgage.

<sup>6</sup> Wilcox v. Walker, 94 Mo., 88, 7 S. W., 115.

of the sale under execution may readily be determined and compensated by an action at law, and equity will not, therefore, interfere by injunction to restrain the threatened sale. Nor does the fact that the mortgagee, in such case, can not avail himself of all possible legal remedies entitle him to relief by injunction if any form of action at law is open to him in which a complete and adequate remedy may be had.<sup>7</sup>

<sup>7</sup> *La Mothe v. Fink*, 8 Bissell, 493; S. C., 12 Chicago Legal News, 152. The rule as stated in the text, and the reasons in its support are very clearly stated in the opinion of Mr. Justice Dyer in this case, as follows: "Accepting the allegations of the bill as true, and admitting that complainant was in possession and held the legal title to the property when it was seized, the question is whether there is such want of adequate remedy at law as entitles complainant to come into a court of equity for relief by injunction to restrain the threatened disposition of the property at execution sale. There is a familiar class of cases cited in the elementary works, in which, on account of their antiquity or historical character, or other peculiar value, jurisdiction in equity was entertained to prevent the transfer or defacement or other injury of articles of personal property, or to compel their specific delivery. But it is stated that these were cases where the articles were of peculiar value and importance, and the loss of which could not be fully compensated in damages. Such was the case of the silver altar-piece bearing a Greek inscription, and of curious antiquity, and which could not be replaced in value: *Somer-*

*set v. Cookson*, 3 P. Will., 390; and of the horn which constituted the tenure by which an estate was held: *Pusey v. Pusey*, 1 Vern., 273; and of the silver tobacco box: *Fells v. Read*, 3 Ves., 70; and of the masonic dresses and decorations: *Lloyd v. Loaring*, 6 Ves., 773. Other similar cases involving articles of property which were family relics or heirlooms, are reported in 13 Ves., 95; 3 Ves. & B., 16, 17, 18, and 10 Ves., 140, 148, 163. All these were cases where the chattels were articles of antiquity or curiosity, or were memorials of affection, or constituted insignia of office, and equitable interposition to preserve them to the owner *in specie*, was sustained on the ground that they were of peculiar character and value, and that the recovery of their intrinsic value in money would not be adequate satisfaction to the owner. There is another class of cases in which courts of equity have interposed to protect the owner of specific chattels in the beneficial enjoyment and use of them in specie. As where certain articles of property were placed in the hands of an agent to be held for the owner, and the agent has threatened to dispose of them to a third party, in violation of his trust. The ground upon



§ 471. **Relief as between judgment creditors and mortgagees.** A judgment creditor of a mortgagor has been allowed an injunction to restrain the mortgagees of his debtor, under a mortgage with power of sale, from paying to the debtor any moneys which they might realize under the power

which equitable relief in such cases has been afforded, is found to lie in the fiduciary relation which existed between the parties, together with the threatened mischief. *Wood v. Rowcliffe*, 3 Hare, 308. The principle upon which jurisdiction may be invoked to grant relief by injunction or decree for specific delivery of personal property in the classes of cases mentioned, is plainly not applicable to the case at bar, for here the case is simply that of seizure and threatened sale upon execution of ordinary personal property, the entire and actual value of which for all purposes is ascertainable, and is wholly measurable by money, and which the alleged owner holds only for purposes of sale and conversion into money, to satisfy a debt. \* \* \* Now, bearing in mind that the application to a particular case of the principle that the absence of a plain and adequate remedy at law offers the only test of equity jurisdiction, must wholly depend upon the character of the case itself, it must be said of the case at bar, that it presents no peculiar or extraordinary features, and that it is plainly distinguishable from the cases that have been noticed, in which relief by injunction was successfully invoked. Why is not complainant's remedy at law, taking the facts as averred

in the bill, plain and adequate? She alleges that she took possession of the property in question under her mortgage. She in effect claims legal title. She took possession and held the property for one purpose only, namely, to sell and convert it into money for satisfaction of her debt. The property is not of peculiar character or value. Its value is readily ascertainable. It has only for her a money value. A recovery of its value affords complete compensation. Whatever damages she may sustain by execution sale of the property can be completely repaired at law. There was some discussion on the argument as to whether she could maintain trover or replevin in this court. Upon that question I forbear to express an opinion. But undoubtedly she could maintain trespass or trover against the marshal, if her claim be well founded in the state court. It is said that she can not maintain replevin in the state court. And so it was argued that her remedy at law was not adequate unless she could have the benefit of all possible legal remedies. But it does not follow because she may not be able to maintain replevin, that an action to recover compensation in damages does not afford adequate remedy. Plain and adequate remedy at law does not mean an abil-

of sale.<sup>8</sup> So a judgment creditor may enjoin the mortgagee of his debtor from assigning a mortgage given by the debtor without consideration from the mortgagee and in anticipation of the adverse outcome of litigation pending between complainant and the debtor.<sup>9</sup> But a judgment creditor will not be enjoined from satisfying his judgment out of the property of his debtor, which is subject to a mortgage, merely because possession of the property by the debtor is necessary to enable the latter to pay the mortgage.<sup>10</sup> And where a mortgagee of chattels took possession of the property upon default in payment and advertised it for sale, and a judgment creditor of the mortgagee then levied upon the chattels, it was held that the mortgagee was not entitled to an injunction against the sale by such judgment creditor, the legal title being regarded as in the mortgagee subject to defeasance upon performance of the condition.<sup>11</sup>

§ 472. **Assignees of mortgage; purchaser subject to mortgage.** Equity will not enjoin a prior mortgagee, under a mortgage with power of sale, from selling the premises in satisfaction of the debt, upon a bill filed by assignees of the mortgagor under an assignment for the benefit of creditors executed subsequent to the mortgage, when the grounds urged for the injunction may all be presented and heard before the

ity to resort to every remedy which the forms of legal procedure give. If any form of action at law will give a complete and adequate remedy, then she is within the principle which tests the right to resort to equity. In an action at law for the alleged trespass, or for conversion of the property, the measure of damages would be the value of the property when taken, with interest from the time of the taking to the time of the trial, and this would under the facts as averred in the bill, cover all damages sus-

tained. Moreover in determining value, the complainant would not be restricted to amounts realized for the property by the marshal on execution sale. She would be at liberty to recover actual value, though the marshal might not have realized one-half such value. Application for injunction denied."

<sup>8</sup> *Thornton v. Finch*, 4 Gif., 515.

<sup>9</sup> *Orr v. Peters*, 197 Pa. St., 606, 47 Atl., 849.

<sup>10</sup> *Coe v. Knox*, 10 Ohio St., 412.

<sup>11</sup> *Adams v. Nebraska City Bank*, 4 Neb., 370.

proper court upon an application to confirm the sale.<sup>12</sup> And, generally, it may be said that a purchaser of real estate subject to a mortgage occupies no better position than the mortgagor for the purpose of restraining a sale under the mortgage, and he can ordinarily urge no defense which could not have been urged by the mortgagor.<sup>13</sup>

§ 473. **Injunction denied where remedy at law.** A sale under a mortgage will not be enjoined upon the application of one who has ample remedy at law for the grievance which is made the ground of his application for equitable relief, the injunction being withheld in such case in conformity with the general doctrine denying the extraordinary remedies of equity in cases which are remediable at law. An injunction will, therefore, be refused against a sale of mortgaged premises upon a bill by complainant claiming title in himself when full relief may be had at law by asserting his claim of title in the method prescribed by statute.<sup>14</sup>

§ 474. **Foreclosure not enjoined because of failure of title.** A court of equity will not interfere by injunction with the foreclosure of a deed of trust in the nature of a mortgage securing unpaid purchase money, upon the ground of a failure of title to a portion of the premises conveyed, when the purchaser and his grantee have remained in undisturbed possession of the premises under covenants of warranty, no proceedings having been taken for eviction and no adverse title having been asserted.<sup>15</sup>

§ 475. **Tenants in common.** As between tenants in common of real property, where one co-tenant has attempted to mortgage the entire estate and the mortgage has been foreclosed, it is proper to enjoin a sale of the premises upon the application of his co-tenants, until partition may be made between the co-tenants, the mortgagor being alleged to be insolvent.<sup>16</sup>

<sup>12</sup> *Powell v. Hopkins*, 38 Md., 1.

<sup>15</sup> *Harding v. Commercial Loan*

<sup>13</sup> *Lee v. Packard*, 25 La. An., 397.

Co., 84 Ill., 251.

<sup>16</sup> *Hines v. Munnerlyn*, 57 Ga.,

<sup>14</sup> *Bailey v. Simpson*, 57 Ga., 523. 32.

§ 476. **Foreign corporation not enjoined from mortgaging its property.** Substantial injury to the rights of the party complaining being an element which must always be made to appear to the satisfaction of a court of equity before it will grant an injunction, a foreign corporation will not be enjoined at the suit of a creditor from mortgaging its property to secure an issue of bonds where it is not shown that the mortgage, if executed, would impair such creditor's rights; and having no lien upon the property which is to be mortgaged, he stands in no better position than other general creditors, and is not entitled to an injunction.<sup>17</sup>

§ 477. **Bill of sale in nature of mortgage.** Where the primary object of the action is to have an instrument purporting to be a bill of sale declared a mortgage, and to have it canceled and for an accounting, an injunction to restrain the sale or disposition of the goods covered by the bill of sale is an appropriate remedy as ancillary to the principal relief sought.<sup>18</sup>

<sup>17</sup> *Rogers v. Michigan Southern*  
R. Co., 38 Barb., 539.

<sup>18</sup> *Laeber v. Langhor*, 45 Md.,  
477.

## IV. WASTE OF MORTGAGED PREMISES.

- § 478. Waste by mortgagor may be enjoined.  
 479. Grounds of the relief.  
 480. Cutting of timber; removal of timber.  
 481. Removal of fixtures, buildings and machinery.  
 482. When mortgagor denied relief.  
 483. Rights of mortgagee against alienee of mortgagor.

§ 478. **Waste by mortgagor may be enjoined.** The jurisdiction of equity to restrain the commission of waste by the mortgagor in possession is clearly established from the authorities and is exercised for the purpose of preventing such acts as would depreciate the value of the premises and render the security insufficient. The rights of the mortgagee being in their nature purely equitable and to be enforced by proceedings in equity, it would be falling short of the demands of justice if a court of equity could not in a proper case interfere by injunction to protect the property which is the subject of controversy from destruction.<sup>1</sup> It is not necessary that the mortgage should be due to warrant the relief, and the court may, if necessary, interfere before the mortgage is due,<sup>2</sup> or after forfeiture on the part of the mortgagor and after a right of action has accrued.<sup>3</sup> And the fact that the mortgagor has been declared a bankrupt and that his property is vested in the hands of an assignee affords strong foundation for the exercise of the jurisdiction.<sup>4</sup>

§ 479. **Grounds of the relief.** The interference of equity to prevent the commission of waste by the mortgagor in pos-

<sup>1</sup> *Brown v. Stewart*, 1 Md. Ch., 87; *Maryland v. Northern C. R. Co.*, 18 Md., 193; *Exhibition Co.*, 188 Ill., 19, 58 N. E., 611.

*Ensign v. Colburn*, 11 Paige, 503; *Gray v. Baldwin*, 8 Blackf., 164; *Bunker v. Locke*, 15 Wis., 635; *Real Estate T. Co. v. Hatton*, 194 Pa. St., 449, 45 Atl., 379; *Williams v. Chicago* 503.

<sup>2</sup> *Murdock's Case*, 2 Bland, 461; *Salmon v. Clagett*, 3 Bland, 126.

<sup>3</sup> *Maryland v. Northern C. R. Co.*, 18 Md., 193.

<sup>4</sup> *Ensign v. Colburn*, 11 Paige, 503.



session rests upon two grounds: first, the right of the mortgagee to the protection of the entire security unimpaired during the life of the mortgage;<sup>5</sup> and, second, that as between mortgagor and mortgagee the latter is deemed in equity the owner of the fee, and as such entitled to protection.<sup>6</sup> But even where the mortgagee is not considered as the owner of the fee he is entitled to the protection of equity against the commission of waste.<sup>7</sup> Thus, where it is held that the mortgage is merely a security for the debt the relief will be allowed to prevent the destruction of the security.<sup>8</sup> But if the injury complained of is such that it may be adequately compensated in damages in an action at law, equity will not interpose in the absence of any allegations of insolvency.<sup>9</sup>

§ 480. **Cutting of timber; removal of timber.** The principal ground, however, upon which equity interferes to enjoin the commission of waste by a mortgagor in possession is the impairment of the security, the land itself being regarded as the primary fund for the payment of the debt. And when the mortgagor in possession is committing waste by the cutting of timber to such an extent as to seriously impair the mortgage security, an appropriate case for an injunction is presented, even though the mortgagor is not shown to be insolvent. If, therefore, the threatened injury is irreparable in its nature, as in the cutting of timber, and so impairs the mortgage security as to render it inadequate, the mortgagee may have an injunction without averring or proving the insolvency of the mortgagor.<sup>10</sup> So upon a bill to foreclose his mortgage,

<sup>5</sup> *Nelson v. Pinegar*, 30 Ill., 473; *Fairbank v. Cudworth*, 33 Wis., 358.

<sup>6</sup> *Nelson v. Pinegar*, 30 Ill., 473.

<sup>7</sup> *Brady v. Waldron*, 2 Johns. Ch., 148.

<sup>8</sup> *Cooper v. Davis*, 15 Conn., 561; *Murdock's Case*, 2 Bland, 461; *Salmon v. Claggett*, 3 Bland, 126.

<sup>9</sup> *Robinson v. Russell*, 24 Cal., 467. For further consideration of the subject of waste committed by mortgagor in possession, see chapter XI, *post*.

<sup>10</sup> *Fairbank v. Cudworth*, 33 Wis., 358; *Starks v. Redfield*, 52 Wis., 349.

the mortgagee is entitled to the aid of an injunction to restrain the mortgagor in possession from cutting timber upon the premises, when it is shown that the land without the timber is a scanty and insufficient security for the debt.<sup>11</sup> So the purchaser of mortgaged premises at a sale under a foreclosure may have an injunction against a terre-tenant holding under the mortgagor, to restrain him from committing waste by the destruction of timber, to the serious injury of the premises, such purchaser being as clearly entitled to the relief as a mortgagee himself would be.<sup>12</sup> While, however, equity may properly enjoin the commission of waste by the mortgagor, consisting in the cutting of timber which was standing or growing at the time of service of the injunction, it will not restrain the removal from the premises of timber already cut before such service, when there is no averment of the mortgagor's insolvency, and no evidence of fraud, and when it does not appear that there is no redress at law.<sup>13</sup>

§ 481. **Removal of fixtures, buildings and machinery.** A court of equity may likewise interfere by injunction to restrain the commission of waste upon the mortgaged premises by the removal of fixtures and implements included in the mortgage, when such removal would have the effect of impairing the security.<sup>14</sup> And as between the mortgagor and mortgagee, equity may interpose by injunction to prevent the severance and removal from the mortgaged real estate of a frame building which forms a part of the realty, and which

<sup>11</sup> *Humphreys v. Harrison*, 1 Jac. & W., 581.

<sup>12</sup> *Thompson v. Lynam*, 1 Del. Ch., 64.

<sup>13</sup> *Bank of Chenango v. Cox*, 1 C. E. Green, 452.

<sup>14</sup> *Robinson v. Preswick*, 3 Edw. Ch., 247; *Williams v. Chicago Exhibition Co.*, 188 Ill., 19, 58 N. E., 611. See also *Dudley v. Hurst*, 67 Md., 44, 8 Atl., 901. And under the

New York code of procedure, when after a foreclosure sale, but before its confirmation, the mortgagor in possession attempts to remove machinery from the premises, which the purchaser claims as part of the realty, the mortgagor may be enjoined. *Mutual Life Ins. Co. v. National Bank of Newburgh*, 18 Hun, 371.

the mortgagor has conveyed to a purchaser who is seeking its removal. The remedy by injunction is regarded as especially appropriate in such a case, since an action for damages would not afford adequate relief.<sup>15</sup> Nor is the relief for the prevention of this species of waste restricted to cases of strict mortgages, but it may be extended in a proper case in aid of the holder of a contract in the nature of a mortgage. And when in a proceeding to foreclose such a contract it is shown that part of the machinery and fixtures included in the contract and covered by the lien have been removed from the premises, and have been levied upon under judgments and proceedings in attachment, such removal rendering plaintiff's security inadequate, it is proper to enjoin the sale or disposition of such fixtures and machinery, notwithstanding their severance and removal from the realty.<sup>16</sup> So the purchaser at a foreclosure sale may restrain the mortgagor from removing from the mortgaged premises machinery which the purchaser claims to be covered by the mortgage, the relief being proper in such case until the question of title to such alleged fixtures may be determined.<sup>17</sup>

§ 482. **When mortgagor denied relief.** In conformity with the general rule denying relief by injunction where adequate remedy exists at law, a mortgagor will not be allowed to enjoin the enforcement of the mortgage upon the ground of waste by the mortgagees in the management of other premises leased to them by the mortgagor as additional security for the debt, when full redress for such mismanagement may be had by proceedings at law for that purpose.<sup>18</sup>

§ 483. **Rights of mortgagee against alienee of mortgagor.** To warrant an injunction in behalf of a mortgagee not in

<sup>15</sup> State Savings Bank v. Kercheval, 65 Mo., 652.

<sup>17</sup> Mutual Life Ins. Co. v. Bigler, 79 N. Y., 568.

<sup>16</sup> Kimball v. Darling, 32 Wis., 675. And to the same effect see Taylor v. Collins, 51 Wis., 123, 8 N. W., 22.

<sup>18</sup> Alston v. Wheatley, 47 Ga., 646.

possession against an alienee of the mortgagor, there must be some substantial injury shown to the freehold, of such a nature as to impair the mortgage security. And the removal from the premises of decayed rails and of the scattered planks of a building which has fallen by reason of its own decay, does not constitute such waste as to justify relief by injunction.<sup>19</sup>

<sup>19</sup> *Coker v. Whitlock*, 54 Ala., 180.

## CHAPTER VIII.

### OF INJUNCTIONS AGAINST TAXES.

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#### I. PRINCIPLES GOVERNING THE JURISDICTION.

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§ 484. **Conflict of authority.** Upon no breach of the law of injunctions has there been manifested greater apparent want of harmony in the decisions of the courts than that pertaining to the exercise of the jurisdiction in restraint of taxation. While it is not difficult to deduce from the great mass of authorities bearing upon the general subject certain cardinal principles which may be said to have the weight of authority in their support, yet it is difficult, if not impossible, to completely and perfectly harmonize these principles with all the decided cases. And the most patient and painstaking analysis must still fail to reconcile the opinions of many of the most respectable courts with the more generally received doctrines governing applications for preventive relief in restraint of the taxing power. Upon the one hand, acting upon the principle that a tax illegally or improperly imposed confers no authority upon the officer who attempts its enforcement, but

renders him a mere trespasser, liable in an action at law for the damages incurred, and upon the kindred principle that all grievances sustained in the exercise of the taxing power should be remedied at law and not in equity, the courts have in most cases been averse to granting preventive relief against the collection of the revenue, and have preferred to leave the parties complaining to the ordinary legal remedies. Upon the other hand, the decisions are neither few in number nor wanting in respectability which have inclined to a departure from the doctrine of non-interference in equity with the collection of taxes; and it will be found, as we proceed, that the courts have in many instances extended preventive relief by injunction against the exercise of the taxing power in cases where such relief was unwarranted, either upon principle or upon the clear weight of authority.<sup>1</sup>

§ 485. **Weight of authority averse to interference; exceptions.** As already indicated, the decided weight of authority is plainly averse to equitable interference with the exercise of the taxing power in the ordinary process of the collection of the revenue. And it may be laid down as a general rule that equity will not interfere by injunction with the collection of a tax which is alleged to be illegal or void, merely because of its illegality, hardship or irregularity, but there must be some special circumstances attending the threatened injury to distinguish it from a mere trespass, and thus to bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law.<sup>2</sup>

<sup>1</sup> For an exceedingly clear and satisfactory discussion of the subject of this chapter, see Cooley on Taxation, 536 *et seq.*

<sup>2</sup> *Dows v. Chicago*, 11 Wal., 108; *Hannewinkle v. Georgetown*, 15 Wal., 547; *State Railroad Tax Cases*, 2 Otto, 575; *Shelton v. Platt*, 139 U. S., 591, 11 Sup. Ct.

Rep., 646, reversing S. C., 39 Fed., 712; *Allen v. Car Co.*, 139 U. S., 658, 11 Sup. Ct. Rep., 682; *Pacific Express Co. v. Seibert*, 142 U. S., 339, 12 Sup. Ct. Rep., 250, affirming S. C., 44 Fed., 310; *Pittsburg, etc., Ry. v. Board of Public Works*, 172 U. S., 32, 19 Sup. Ct. Rep., 90; *Arkansas*

An exception to the rule has been allowed in cases where the proceedings, though illegal and void, were under legal color

*Building Ass'n v. Madden*, 175 U. S., 269, 20 Sup. Ct. Rep., 119; *Indiana Mfg. Co. v. Koehne*, 188 U. S., 681, 23 Sup. Ct. Rep., 452; *Robinson v. City of Wilmington*, 13 C. C. A., 177, 65 Fed., 856; *Hoey v. Coleman*, 46 Fed., 221; *Nye v. Town of Washburn*, 125 Fed., 817; *Williams v. Dutton*, 184 Ill., 608, 56 N. E., 868; *Alabama Gold Life Insurance Co. v. Lott*, 54 Ala., 499; *Heywood v. Buffalo*, 14 N. Y., 534; *Susquehanna Bank v. Supervisors of Broome Co.*, 25 N. Y., 312; *Mutual Benefit Life Insurance Co. v. Supervisors*, 33 Barb., 322; *Burnes v. Mayor*, 2 Kan., 454; *Sayre v. Tompkins*, 23 Mo., 443; *Barrow v. Davis*, 46 Mo., 394; *McPike v. Pew*, 48 Mo., 525; *Warden v. Supervisors*, 14 Wis., 618; *Kellogg v. Oshkosh*, Ib., 623; *Clarke v. Ganz*, 21 Minn., 387; *Western R. Co. v. Nolan*, 48 N. Y., 513; *Wells v. Dayton*, 11 Nev., 161; *Bogert v. City of Elizabeth*, 10 C. E. Green, 427; *McClung v. Livesay*, 7 West Va., 329; *Douglass v. Town of Harrisville*, 9 West Va., 162; *Wilson v. Town of Philippi*, 39 West Va., 75, 19 S. E., 553; *Blue Jacket C. C. Co. v. Scherr*, 50 West Va., 533, 40 S. E., 514; *Harkness v. Board of Public Works*, 1 McArthur, 121; *City Council v. Sayre*, 65 Ala., 564; *Greenhood v. MacDonald*, 183 Mass., 342, 67 N. E., 336; *Minneapolis, etc. Ry. Co. v. Dickey County*, 11 N. Dak., 107, 90 N. W., 260; *Welch v. Clatsop County*, 24 Ore., 452, 33 Pac., 934; *Insurance Co. v. Bounner*, 24 Col., 220, 49 Pac., 366; *Bellevue Imp. Co. v. Village of Bellevue*, 39 Neb., 876, 58 N. W., 446. But see, *contra*, *Williams v. Peinny*, 25 Iowa, 436; *Jeffersonville v. Patterson*, 32 Ind., 140; *Fahlor v. Board of Commissioners*, 101 Ind., 167; *Hobbs v. Board of Commissioners*, 103 Ind., 575, 3 N. E., 263; *Board of Commissioners v. Barker*, 25 Kan., 258; *Topeka City Ry. Co. v. Roberts*, 45 Kan., 360, 25 Pac., 854; *Topeka W. S. Co. v. Roberts*, 45 Kan., 363, 25 Pac., 855; *St. Louis & S. F. R. Co. v. Apperson*, 97 Mo., 300, 10 S. W., 478; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb., 369, 70 N. W., 955; *Chicago, B. & Q. R. Co. v. Nebraska City*, 53 Neb., 453, 73 N. W., 952; *Penick v. High S. Mfg. Co.*, 113 Ga., 592, 38 S. E., 973; *Wood v. Draper*, 24 Barb., 187; *S. C.*, 4 Ab. Pr., 322, where it is held that a tax contrary to law, or levied without authority of law, may be enjoined, although in the latter case the relief was denied because complainant had not averred in his bill that it was filed in behalf of all others similarly situated, the court holding that such an averment was necessary to a complete determination of the rights of the parties. In *Heywood v. Buffalo*, 14 N. Y., 534, it is held that three exceptions exist to the rule, as stated in the text: first, where the proceedings will necessarily lead to a multiplicity of suits; second, where they lead in their execution to the commission of irreparable injury to the freehold; third, where the claim of

and apparently authorized by law.<sup>3</sup> So where there was an entire absence of authority for the assessment of the tax, or for proceedings thereunder, the relief has been granted. Thus, a sheriff whose term of office has expired has been enjoined from selling property in satisfaction of the tax, which he might rightfully have done during his term.<sup>4</sup> And a tax levied without authority by a corporation, or by persons acting as such, may be enjoined.<sup>5</sup> So where the officers levying the tax were improperly elected and their action is therefore void,<sup>6</sup> or where the tax is levied by less than the requisite majority of a board of supervisors intrusted with the taxing power, an injunction may be allowed.<sup>7</sup> So also an injunction will be granted against a tax based upon an increase in plaintiff's assessment made by a board of review after the expiration of

the adverse party to the land sold for the unpaid taxes is valid upon the face of the instrument, or the proceedings sought to be set aside are valid upon their face and intrinsic facts are necessary to be proven in order to establish the invalidity or illegality. "Whenever," say the court, "a case is made by the pleadings falling within these exceptions, or either of them, equity will interpose to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud from the title." However clear and satisfactory this statement of the exceptions to the rule may appear, it will be found as we proceed that it does not comprehend all the recognized exceptions, and a serious conflict of authority may be observed running through all the cases.

<sup>3</sup> *Burnet v. Cincinnati*, 3 Ohio, 73; *Culbertson v. Same*, 16 Ohio, 574; *Jonas v. Same*, 18 Ohio, 318;

*McDonald v. Murphree*, 45 Miss., 705; *Coulson v. Harris*, 43 Miss., 728. But this exception has been denied in *McCoy v. Chillicothe*, 3 Ohio, 370.

<sup>4</sup> *Fremont v. Boling*, 11 Cal., 380. And see *Durham v. Linderman*, 10 Okla., 570, 64 Pac., 15, where, in a similar case, an injunction was granted under the provisions of a statute authorizing such relief against a levy under an illegal tax or against any proceeding to collect the same.

<sup>5</sup> *Beverly v. Sabin*, 20 Ill., 357; *Ottawa v. Walker*, 21 Ill., 610. It is difficult, however, to perceive any sufficient reason why the relief should be granted in such cases, since the persons thus assuming to enforce the tax without authority are trespassers, and are liable at law for the damages incurred.

<sup>6</sup> *Kinyon v. Duchene*, 21 Mich., 498.

<sup>7</sup> *Supervisors v. Webster*, 53 Ill., 141.

their session as fixed by law.<sup>8</sup> So equity will restrain a county clerk from extending a school tax levied by school directors upon property in a school district where their jurisdiction had previously ceased.<sup>9</sup> These exceptions, however, with others to be noticed hereafter, only serve to emphasize the general doctrine as above stated, and it may now be accepted as the established rule that equitable relief will not be allowed because of mere illegalities, such as excess in valuation, or because of the hardship and injustice of the law under which the taxing power is exercised.<sup>10</sup> In the absence, therefore, of some circumstances to bring the case within some of the well defined heads of equity jurisdiction, preventive relief will not be extended merely upon the ground of the illegality or hardship of the tax, and for all such grievances the taxpayer, if entitled to any remedy, should seek it in a legal rather than an equitable forum. And the federal courts sitting in equity in the different states interfere with extreme caution with the collection of the revenue of the states, or of their public or municipal agencies, and will not interfere by injunction unless in a plain case of equitable jurisdiction and of great injury for which there is no adequate remedy at law.<sup>11</sup> Where, however, the legal remedy is inadequate for the proper protection of the plaintiff's rights, a federal court may properly restrain the enforcement of an illegal tax levied by state authority. Thus, where resort to the legal remedy would subject the taxpayer to a multiplicity of separate actions against each of the several taxing municipalities for the recovery of the illegal tax, equitable relief is properly granted.<sup>12</sup> So where the legal remedy

<sup>8</sup> *Yocum v. Bank*, 144 Ind., 272, 43 N. E., 231.

<sup>9</sup> *School Directors v. School Directors*, 135 Ill., 464, 28 N. E., 49.

<sup>10</sup> *Hannewinkle v. Georgetown*, 15 Wal., 547; *State Railroad Tax Cases*, 2 Otto, 575; *Alabama Gold Life Insurance Co. v. Lott*, 54 Ala., 499; *Gage v. Evans*, 90 Ill., 569.

<sup>11</sup> *Union Pacific R. Co. v. Lincoln Co.*, 2 Dill., 279. And see as to the right to enjoin a state tax in the federal courts, *Wells v. Central Vermont R. Co.*, 14 Blatch, 426.

<sup>12</sup> *Pyle v. Brenneman*, 60 C. C. A., 409, 122 Fed., 787.



depends for its adequacy entirely upon the will of the opposing party, it is not regarded as adequate within the meaning of the rule and relief by injunction will therefore be allowed.<sup>13</sup>

§ 486. **Injunction not allowed for irregularities.** Nor will equity interfere by injunction with the enforcement or collection of taxes because of irregularities, illegalities or errors in the assessment of the tax, or in the proceedings incident to its collection, or in the execution of the power conferred upon taxing officers, but in all such cases the taxpayer seeking relief will be left to pursue his remedy at law.<sup>14</sup> And

<sup>13</sup> *Bank of Kentucky v. Stone*, 88 Fed., 383.

<sup>14</sup> *Clinton, etc., Appeal*, 56 Pa. St., 315; *O'Neal v. Virginia B. Co.*, 18 Md., 1; *Livingston v. Hollenbeck*, 4 Barb., 9; *Macklot v. Davenport*, 17 Iowa, 379; *Center Co. v. Black*, 32 Ind., 468; *Warden v. Supervisors*, 14 Wis., 618; *Kellogg v. Oshkosh*, Ib., 623; *Exchange Bank v. Hines*, 3 Ohio St., 1; *Jackson v. Detroit*, 10 Mich., 248; *Williams v. Mayor*, 2 Mich., 560; *Greene v. Mumford*, 5 R. I., 472; *Schofield v. Watkins*, 22 Ill., 66; *Chicago, B. & Q. R. Co. v. Frary*, Ib., 34; *Merritt v. Farris*, Ib., 303; *Munson v. Minor*, Ib., 594; *Metz v. Anderson*, 23 Ill., 463; *Hallenbeck v. Hahn*, 2 Neb., 377; *Iowa Railroad Land Co. v. County of Sac*, 39 Iowa, 124; *Same v. Carroll Co.*, 39 Iowa, 151; *Gay v. Hebert*, 25 La. An., 196; *Challiss v. Commissioners of Atchison Co.*, 15 Kan., 49; *Stebbins v. Challiss*, 15 Kan., 55; *Supervisors v. Jenks*, 65 Ill., 275; *Swinney v. Beard*, 71 Ill., 27; *George v. Dean*, 47 Tex., 73; *Hall v. Houston & T. C. R. Co.*, 39 Tex., 286; *Whittaker v. City of Janesville*, 33 Wis., 76;

*Brown v. Herron*, 59 Ind., 61; *City of Delphi v. Bowen*, 61 Ind., 29; *Western R. Co. v. Nolan*, 48 N. Y., 513; *Parker v. Challis*, 9 Kan., 155; *Smith v. Commissioners of Leavenworth*, Ib., 296; *City of Lawrence v. Killam*, 11 Kan., 499; *Coulson v. Harris*, 43 Miss., 728; *Albany & B. M. Co. v. Auditor-General*, 37 Mich., 391; *Rio Grande R. Co. v. Scanlan*, 44 Tex., 649; *Adams v. Beman*, 10 Kan., 37; *Finnegan v. City of Ferdinandina*, 15 Fla., 379; *Huck v. Chicago & Alton R. Co.*, 86 Ill., 352; *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill., 320; *Floyd v. Gilbreath*, 27 Ark., 675; *Murphy v. Harbison*, 29 Ark., 340; *Savings & Loan Society v. Austin*, 46 Cal., 415; *Houghton v. Austin*, 47 Cal., 646; *Central Pacific R. Co. v. Corcoran*, 48 Cal., 65; *Dean v. Davis*, 51 Cal., 406; *Rockingham Savings Bank v. Portsmouth*, 52 N. H., 17; *Brown v. Concord*, 56 N. H., 375; *Union Trust Co. v. Weber*, 96 Ill., 346; *People's Savings Bank v. Tripp*, 13 R. I., 621; *Keigwin v. Drainage Commissioners*, 115 Ill., 347, 5 N. E., 575; *Kansas City, F. S. & G. R. Co. v. Tontz*, 29 Kan., 460; *Ryan v. Board*

where it does not appear that the established principle of taxation has been violated, or that actual and substantial injustice will result from the operation of the tax, or that it was for an

of Commissioners, 30 Kan., 185, 2 Pac., 156; *Gillette v. City of Denver*, 21 Fed., 822; *Avant v. Flynn*, 2 S. Dak., 153, 49 N. W., 15; *Fifield v. Marinette Co.*, 62 Wis., 532, 22 N. W., 705; *Wisconsin Central R. Co. v. Lincoln Co.*, 67 Wis., 478, 30 N. W., 619; *Hixon v. Oneida County*, 82 Wis., 515, 52 N. W., 445; *Hibernian Benevolent Society v. Kelly*, 28 Ore., 173, 42 Pac., 3, 30 L. R. A., 167, 52 Am. St. Rep., 769; *Boyd v. Wiggins*, 7 Okla., 85, 54 Pac., 411; *Sweet v. Boyd*, 6 Okla., 699, 52 Pac., 939; *Reynolds v. Drainage District*, 134 Ill., 268, 25 N. E., 516; *Lawrence v. Traner*, 136 Ill., 474, 27 N. E., 197; *Earl & Wilson v. Raymond*, 188 Ill., 15, 59 N. E., 19; *Kimbark v. Raymond*, 188 Ill., 66, 59 N. E., 1133; *Mayer v. Raymond*, 188 Ill., 143, 59 N. E., 1133; *Ayers v. Widmayer*, 188 Ill., 121, 58 N. E., 956; *Martin v. Barnett*, 188 Ill., 288, 58 N. E. 977; *Pratt v. Raymond*, 188 Ill., 469, 59 N. E., 16; *American Express Co. v. Raymond*, 183 Ill., 232, 59 N. E., 528; *Booth & Co. v. Raymond*, 191 Ill., 351, 61 N. E., 129; *Equalization Board v. Land Owners*, 51 Ark., 516, 11 S. W., 822; *United Lines T. Co. v. Grant*, 137 N. Y., 7, 32 N. E., 1005.

The grounds upon which the relief is refused in cases of irregularity in the proceedings are very clearly stated by Caton, C. J., in *Chicago v. Frary*, 22 Ill., 34, as follows: "We have in this case been called on to inquire in what cases the powers of a court of chancery

may be exercised to restrain the collection of the revenue of the state. The decisions of this court show, that in a large majority of the cases involving the regularity of the proceedings for the collection of the revenue, we have met with irregularities in the proceedings to such an extent as to destroy the titles to real estate acquired at tax sales. In this way, has a court of common law afforded a remedy for irregularities in the execution of the revenue laws. The same and even additional redress is afforded to parties whose personal property is seized for a tax illegally assessed. If in all these cases the court of chancery had taken the matter in hand, and examined the regularity of the proceedings whenever an attempt was made to collect the revenue, and restrained its collection, if it were shown that the law had not been complied with in the assessment of the taxes, the result would have been that in many if not most cases the collection of the revenue would have been enjoined, and taxes would not have been collected. Under such a system of the administration of the laws, with so complicated a revenue system as ours, rendered so by a tender regard for the rights and interests of the citizen, no government could exist for a single year. Let us now, by sustaining this bill, stretch out the strong arm of this court and stay the hand of the

unauthorized purpose, equity will not restrain the execution of a deed of land sold for taxes on the ground that the proceed-

collector in every case where any irregularity can be shown in the assessment of the revenue, and a flood of injunctions would be spread over the land at once. State and county revenue would cease to be collected, at least till the termination of protracted litigation, and the wheels of government would stop. It is no answer to say, let those whose duty it is to administer the revenue law do it with greater care, and do everything which the law requires, just as it requires, and at the time specified, and be careful that they do no more than is required. We must take things as they are and look at practical results. Neither precedents nor reason will warrant the use of the writ of injunction for such purposes, and to produce such results. Where the law affords an adequate remedy this writ can not be used, and especially where greater mischief will flow than good will result from it, the court will always withhold this species of relief. Equity can not attempt to prevent, any more than it will redress all wrongs. It is not in ordinary but in extraordinary cases that this writ is properly invoked. If the law can redress the wrong—if it can repair the injury, equity must suffer it, and let the courts of law redress it. This is the general rule to which there are no doubt exceptions, and exceptions, too, in cases of the collection of taxes. Those exceptions are confined almost, if not entirely, to cases where the tax itself is not authorized by law, or if the tax itself is authorized, it is assessed upon property which is not subject to the tax. Such was the case of the *Illinois Central Railroad Company v. The County of McLean*, 17 Ill. R., 291. There we enjoined a tax levied upon property not subject to that tax. But it is unnecessary to refer to all the cases to be met with in our own and other reports on this subject. Where an injunction has been finally sustained it will generally, if not always, be found to be of this class. It is possible that cases may sometimes be found where this distinction has been disregarded from inadvertence, or from the peculiar circumstances connected with them. We can find no other basis for a reasonable and practical distinction. If we permit the injunction to be issued where the tax is authorized by law and the thing taxed is liable to that tax, there is no stopping point short of enjoining all taxes, whenever any irregularity has intervened. This power the court of chancery has never assumed, nor could it without the most disastrous consequences to the state. There may be cases, the particular circumstances or peculiar hardships of which will justify an exception to this general rule. This is not one. We have examined the alleged irregularities in the levy of this tax, and are by no means prepared to say that they can be sus-

ings were irregular, or even void in some particulars.<sup>15</sup> In all such cases, the burden of complaint being the illegality, error or irregularity in the action of the officers charged with the duty of levying and collecting the revenue, it is presumed that an adequate remedy may be found in the courts of law, and equity therefore refuses to interfere by the extraordinary remedy of injunction.<sup>16</sup> Nor will the collection of a tax be

tained anywhere. Indeed, we think a satisfactory answer to all these objections possible, but we choose to place our decision upon the broad ground of jurisdiction, that all may distinctly know when the court of chancery will, and when it will not interfere to enjoin the collection of the public revenue, or at least that they may know what the general rule on this subject is."

<sup>15</sup> *Warden v. Supervisors*, 14 Wis., 618; *Kellogg v. Oshkosh*, Ib., 623. *Warden v. Supervisors* was a proceeding in equity to enjoin the execution of a deed of certain lands sold for taxes, upon the ground of irregularities in the assessment. The chief point relied upon was the fact that the taxes for a certain year, not being paid, were carried over and included in the tax roll and treasurer's warrant for the succeeding year. Dixon, C. J., in giving the opinion of the court, says: "The collection of a tax, under the statute, is a legal proceeding to enforce the payment of a debt due the public, and, like proceedings at law upon a private claim, equity will only interfere to prevent injustice by the unfair use of the process of the law. The primary and controlling principle in such cases is, that the proceedings to be stayed are inequitable

and unjust, and that it will be against conscience to allow them to go on. *Stokes v. Knarr*, 11 Wis., 389; *Ableman v. Roth*, 12 Wis., 91. It will not be enough to show that they are irregular or even void. Courts of equity do not sit to reverse or correct errors and mistakes of law. To be entitled to their assistance the party applying must show that he is in danger of unjustly losing a substantial right, and that he is in no fault. Neither of these things appears in this case." And accordingly the action was dismissed. But see, *contra*, *Myrick v. La Crosse*, 17 Wis., 442, where it is held that if the defect in the proceedings is not simply one of form, or a technical error, but is a material defect, depriving complainant of a substantial and valuable right secured to him by law, the assessment is invalid and the injunction will be allowed to restrain proceedings thereunder. And in *Siegel v. Supervisors*, 26 Wis., 70, it is held that the issuing of a tax deed for lands sold under a tax adjudged to be void may be enjoined by one whose title, though acquired after the assessment, will yet be clouded by such deed.

<sup>16</sup> *Dows v. Chicago*, 11 Wal., 108; *Clinton, etc.*, Appeal, 56 Pa.



enjoined because of errors or irregularities in the proceedings, or because of an improper valuation or assessment, which might have been corrected by timely application to the proper officers,<sup>17</sup> nor where adequate relief may be had by appeal from the action of such officers.<sup>18</sup>

§ 487. **Equity powerless to correct tax.** In addition to the reasons already suggested for the doctrine of non-interference in equity with the collection of the revenue, may be mentioned the want of power in the court to afford complete relief by correcting mistakes and errors, or by setting the taxing machinery again in motion for the purpose of again levying and enforcing a tax which has been found to be illegal or defective. A court of equity is powerless to apportion a tax, or to make a new assessment, or to direct the making of another assessment by the proper officers, the levying and collection of a tax being in no sense a judicial function, but one which pertains rather to the political functions of the government, to be exercised by the proper officers to whom the power is intrusted. And the fact that courts of equity are thus hampered in any attempt at the exercise of jurisdiction over matters of taxation by their inability to do complete justice, either by making or causing to be made a new assessment upon principles which they might deem just, affords additional reason for withhold-

St., 315; *Warden v. Supervisors*, 14 Wis., 618. And see *Cooley on Taxation*, 536, 540, 541. In Connecticut the disposition of the courts is strongly averse to interference by injunction with the collection of taxes, and the courts will not interpose in the absence of circumstances of imperative necessity. *Arnold v. Middletown*, 39 Conn., 401; *Dodd v. City of Hartford*, 25 Conn., 232; *Rowland v. First School District*, 42 Conn., 30; *Wat-*

*erbury Savings Bank v. Lawler*, 46 Conn., 243.

<sup>17</sup> *Covington v. Town of Rockingham*, 93 N. C., 134; *Johnson v. Roberts*, 102 Ill., 655; *Felsenthal v. Johnson*, 104 Ill., 21; *Humphreys v. Nelson*, 115 Ill., 45, 4 N. E., 637; *Camp v. Simpson*, 118 Ill., 224, 8 N. E., 308. See also *New York Stock Exchange v. Gleason*, 121 Ill., 502, 13 N. E., 204.

<sup>18</sup> *Van Nort's Appeal*, 121 Pa. St., 118, 15 Atl., 473; *Hendricks v. Gilchrist*, 76 Ind., 369.



ing relief by injunction against the exercise of the taxing power.<sup>19</sup>

§ 488. **Irregularities in assessment no ground for injunction.**

Having thus considered the general doctrine denying relief by injunction against the collection of taxes upon grounds of mere error or irregularity in the proceedings, it is proposed to present somewhat in detail various illustrations of the application of the doctrine, before passing to the discussion of those cases in which a departure from the rule of non-interference has been allowed. The most frequent class of cases in which the rule as stated has been applied are cases where the defect or irregularity complained of is in the action of the officers charged with the preliminary duty of making the assessment. And upon this point it is to be borne in mind that the fact of an assessment being illegal and improperly made does not necessarily render all taxes founded thereon void, or authorize an injunction against their collection.<sup>20</sup> The courts have therefore generally refused to interfere because of mere irregularities or omissions in the acts of the officers charged with the duty of making the assessment.<sup>21</sup> And when it is not charged that the tax was assessed upon property not subject to taxation, or that it was not authorized by law, its enforcement will not be enjoined because of irregularities in the action of the officers making the assessment.<sup>22</sup> So the omission by the as-

<sup>19</sup> *State Railroad Tax Cases*, 2 Otto, 575. See also *Traders Ins. Co. v. Farwell*, 102 Ill., 413.

<sup>20</sup> *Adams v. Beman*, 10 Kan., 37.

<sup>21</sup> *Swinney v. Beard*, 71 Ill., 27; *Supervisors v. Jenks*, 65 Ill., 275; *Albany & B. M. Co. v. Auditor-General*, 37 Mich., 391; *Rio Grande R. Co. v. Scanlan*, 44 Tex., 649; *George v. Dean*, 47 Tex., 73; *Gay v. Hebert*, 25 La. An., 196; *Western R. Co. v. Nolan*, 48 N. Y., 513; *Ricketts v. Spraker*, 77 Ind., 371. But in Ohio jurisdiction is conferred

red by statute upon the courts of common pleas to enjoin the collection of taxes illegally assessed. And see as to the principles which govern the courts in the exercise of the jurisdiction thus conferred, *Glenn v. Waddel*, 23 Ohio St., 605; *Burgett v. Norriss*, 25 Ohio St., 308; *Wight v. Thomas*, 26 Ohio St., 346; *Hays v. Jones*, 27 Ohio St., 218.

<sup>22</sup> *Swinney v. Beard*, 71 Ill., 27; *Lyle v. Jacques*, 101 Ill., 644.

sessors to call upon taxpayers for a list of their taxable property as required by law is treated as a mere irregularity, and not as sufficient ground for enjoining the tax.<sup>23</sup> Nor does the fact that real property was not assessed in the name of the owner warrant the relief.<sup>24</sup> So irregularities in the making of the assessment roll under which a tax is levied and collected, although they may show a want of proper diligence upon the part of the officers whose duty it is to make the assessment, do not warrant an injunction against the tax when it is not shown that complainants are not in equity and conscience chargeable for the full amount of the tax claimed of them.<sup>25</sup> So the failure of the assessor to verify the assessment roll under oath as required by law is a mere irregularity which does not render the tax void and therefore constitutes no ground for equitable relief against its enforcement.<sup>26</sup> Nor will the collection of a tax be enjoined upon the ground that the action of the board of review in increasing an assessment as returned by the assessor was based upon evidence which would have been inadmissible in a court of law under the rules of evidence.<sup>27</sup> Nor will the relief be granted because of the failure of the assessment books to show the full valuation of plaintiff's property upon which the assessed valuation is based, or upon the ground that the board of review, having examined witnesses as to plaintiff's financial standing, failed to place them under oath, or to give plaintiff an opportunity to cross-examine them.<sup>28</sup> And a sale of lands for delinquent taxes will not be restrained because of irregularities in the assessment roll, when no inequalities or injustice is shown in the tax.<sup>29</sup>

<sup>23</sup> *Supervisors v. Jenks*, 65 Ill., 275.

<sup>24</sup> *Id.*

<sup>25</sup> *George v. Dean*, 47 Tex., 73.

<sup>26</sup> *Avant v. Flynn*, 2 S. Dak., 153, 49 N. W., 15; *Fifield v. Marinette Co.*, 62 Wis., 532, 22 N. W., 705, in effect overruling *Marsh v. Supervisors of Clark Co.*, 42 Wis.,

502; *Wisconsin Central R. Co. v. Lincoln Co.*, 67 Wis., 478, 30 N. W., 619.

<sup>27</sup> *Hixon v. Oneida County*, 82 Wis., 515, 52 N. W., 445.

<sup>28</sup> *Earl & Wilson v. Raymond*, 188 Ill., 15, 59 N. E., 19.

<sup>29</sup> *Albany & B. M. Co. v. Auditor-General*, 37 Mich., 391.

So mere irregularities in the valuation of property for taxation, or an excessive valuation, in the absence of fraud, will not warrant relief by injunction.<sup>30</sup> And complainant's laches in seeking relief may constitute sufficient ground for refusing an injunction,<sup>31</sup> especially where the greater part of the tax has been collected before the filing of the bill.<sup>32</sup> Nor will equity enjoin such a sale because of an irregularity in the publication of notice to taxpayers of the assessment, when complainant had actual notice, and when he shows no injury to himself by the assessment and levy of the tax.<sup>33</sup> So where a remedy at law exists by *certiorari* for the correction of errors committed by assessors in the discharge of their duties, the assessment will not be enjoined.<sup>34</sup> And when complainant has neglected to avail himself of the means provided by law for the correction of errors in the assessment, he will not be allowed relief by injunction because of such errors.<sup>35</sup> Where, however, the grievance complained of consists in the mode and form of collecting the tax, rather than in the rate or assessment, and where no remedy has been provided by law for such improper manner of collection, an injunction has been allowed because of the want of a remedy at law.<sup>36</sup>

<sup>30</sup> *Wagoner v. Loomis*, 37 Ohio St., 571; *Woodman v. Ely*, 2 Fed., 839.

<sup>31</sup> *Stamper v. Roberts*, 90 Mo., 683, 3 S. W., 214.

<sup>32</sup> *Kennedy v. Montgomery Co.*, 98 Tenn., 165, 38 S. W., 1075.

<sup>33</sup> *Gay v. Hebert*, 25 La. An., 196.

<sup>34</sup> *Western R. Co. v. Nolan*, 48 N. Y., 513.

<sup>35</sup> *Rio Grande R. Co. v. Scanlan*, 44 Tex., 649; *Wagoner v. Loomis*, 37 Ohio St., 571. And in Indiana it is held that a bill seeking to enjoin a county treasurer from collecting a tax because of errors and illegalities in the assessment is bad on

demurrer if it fails to allege that the treasurer is attempting to collect the tax. *Pugh v. Irish*, 43 Ind., 415.

<sup>36</sup> *Miller v. Gorman*, 38 Pa. St., 309; *Bogart v. City of Elizabeth*, 10 C. E. Green, 427. And in Kentucky the right to enjoin an illegal tax or assessment is well established, the relief being granted because of the inadequacy of the remedy at law. *Gates v. Barrett*, 79 Ky., 295; *Baldwin v. Shine*, 84 Ky., 502, 2 S. W., 164; *Negley v. Henderson B. Co.*, 107 Ky., 414, 54 S. W., 171. And see *Baldwin v. Hewitt*, 88 Ky., 673, 11 S. W., 803.

§ 489. **Illustrations of irregularities on which injunction refused.** In further illustration of the doctrine under discussion, it is held that where the ground of complaint is only with reference to the manner of transferring and placing a tax upon the books, as in the manner of returning the tax by a township clerk to the clerk of a county board of supervisors, equity will not relieve by injunction against the payment of taxes legally levied and justly due.<sup>37</sup> And the fact that taxing officers have been delinquent in the discharge of their duty by not seizing the personal property of the taxpayer in satisfaction of the tax, when first assessed, affords no ground for enjoining its collection when subsequently assessed.<sup>38</sup> So a mere irregularity in the tax, when the whole amount is not illegal, will not warrant an injunction.<sup>39</sup> And where the error complained of consists in the misnomer of a corporation upon the assessment books the relief will be refused.<sup>40</sup> Nor does the fact that property subject to taxation has not been listed warrant interference by injunction. Nor will a sale of property for unpaid taxes be enjoined merely on account of irregularities in the giving of notice of the time and place of sale.<sup>41</sup> So a court of equity will not enjoin the transfer of tax sale certificates, or the issuing of tax deeds thereon, because of irregularities in the tax proceedings, when the property sold is subject to taxation, the tax legal, and the valuation not excessive.<sup>42</sup> Indeed, the doctrine of non-interference because of irregularities applies not only to general and special taxes alike, but also to the issuing of a tax deed upon a sale of land for unpaid taxes, since the deed is but one step in the

<sup>37</sup> *Iowa Railroad Land Co. v. Md.*, 1; *Hibernian Benevolent Society v. Kelly*, 28 Ore., 173, 42 Pac., 3, 30 L. R. A., 167, 52 Am. St. Rep., 769; *Booth & Co. v. Raymond*, 191 Ill., 351, 61 N. E., 129.

<sup>38</sup> *Whittaker v. City of Janesville*, 33 Wis., 76.

<sup>39</sup> *Brown v. Herron*, 59 Ind., 61; *City of Delphi v. Bowen*, 61 Ind., 29.

<sup>40</sup> *O'Neal v. Virginia B. Co.*, 18

<sup>41</sup> *Finnegan v. City of Fernandina*, 15 Fla., 379.

<sup>42</sup> *Challiss v. Commissioners of*

proceedings for the enforcement of the tax.<sup>43</sup> So equity will not enjoin the collection of a tax because of an excessive levy, or where no injury is shown which can not be adequately compensated in damages, but will leave the aggrieved taxpayer in such case to his remedy at law.<sup>44</sup> And it has been held that to give a court of equity jurisdiction to enjoin a tax it must be shown that the collector is about to sell property unlawfully in satisfaction of the tax, and that such sale will result in irreparable injury to the complaining taxpayer.<sup>45</sup>

§ 490. **Errors and mistakes of officers; distinction between void and voidable tax.** In reviewing the action of taxing officers upon bills to enjoin the enforcement of a tax, courts of equity are inclined to indulge the usual presumption in favor of the regularity and validity of the conduct of public officers, until the contrary is shown. They will not, therefore, enjoin upon mere general averments that the assessment was too high, and that testimony was produced before the taxing board to show that fact, but all the facts should be affirmatively shown in the bill.<sup>46</sup> So where fraud upon the part of the officers is relied upon as a ground of equitable relief the facts constituting the fraud should be set forth, and not mere general allegations of fraudulent conduct.<sup>47</sup> And in applications for equitable relief against taxation a distinction is to be observed between cases where there is an entire absence of authority upon the part of the taxing officer, and cases of a mistaken or wrongful execution of an authority which has been duly conferred. And if the officer is acting under a valid law, and confines himself within its limits as to the rate and objects of taxation, he will not be enjoined, although errors and abuses may occur in the exercise of the power.<sup>48</sup> A

Atchison Co., 15 Kan., 49; Stebbins v. Challiss, 15 Kan., 55.

<sup>43</sup> City of Lawrence v. Killam, 11 Kan., 499.

<sup>44</sup> Coulson v. Harris, 43 Mo., 728.

<sup>45</sup> Id.

<sup>46</sup> Tainter v. Lucas, 29 Wis., 375.

<sup>47</sup> Id.

<sup>48</sup> Decker v. McGowan, 59 Ga., 805. See also Georgia Mutual Loan Association v. McGowan, 59 Ga., 811.



distinction had also been drawn between a defect in the law itself under which the tax is being collected, and mere irregularities in its execution; and while, in the former case, equitable relief may sometimes be allowed, in the latter it will be withheld.<sup>49</sup> So equity will not enjoin a tax which is merely voidable and not void, and will not interfere because other property has been assessed at a lower rate than that of complainants.<sup>50</sup> And where certain taxes are authorized by an act of legislature to be levied and collected for a work of public improvement, and officers are appointed to act under oath and to be the sole judges of what lands will be benefited by the improvement, and to assess only such lands, a court of equity will not interfere by injunction with the exercise of the judgment of such officers upon grounds of mistake or error in judgment, in the absence of fraud, but will leave the party aggrieved to pursue his legal remedy.<sup>51</sup> And it may be said generally that courts of equity will not interfere with the collection of taxes because of mistakes in judgment on the part of the officers assessing the tax, when they have acted fairly and impartially and are not chargeable with bad faith.<sup>52</sup>

§ 490 *a*. **When overvaluation no ground for injunction.** The rule is well established that, in the absence of fraudulent conduct upon the part of an assessing officer or board, the courts will not interfere by injunction with the collection of taxes, where the only ground for complaint is that of an excessive assessment or overvaluation of the taxpayer's property. Where the law imposes the duty of valuing property for taxation upon a particular officer or tribunal, their action is judicial in its nature, and so long as they exercise their honest judgment in the matter and are guilty of no fraud, caprice or other improper motive, their action is not reviewable in equity

<sup>49</sup> *Center Co. v. Black*, 32 Ind., 468.

<sup>50</sup> *Gulf R. Co. v. Morris*, 7 Kan., 210, affirmed in *Gulf R. Co. v. Blake*, 9 Kan., 489.

<sup>51</sup> *Clayton v. Lafargue*, 23 Ark., 137.

<sup>52</sup> *Le Roy v. New York*, 4 Johns. Ch., 352. This was a bill for relief against an assessment made to de-

even though the chancellor be of the opinion that their valuation is too high, and relief by injunction will accordingly be denied.<sup>53</sup>

fray the expense of constructing a common sewer in the city of New York, and to enjoin the commissioners from collecting the assessment on the ground that it did not include all property holders benefited by the improvement. Kent, Chancellor, says: "I can not find that the court interferes in cases of this kind, where the act complained of was done fairly and impartially, according to the best judgment and discretion of the assessors; and a precedent, once set, would become very embarrassing and extensive in its consequences. If the power under this statute had been exercised in bad faith and against conscience, I might have attempted to control it; but a mere mistake of judgment in a case depending so much upon sound discretion, can not properly be brought into review, under the ordinary powers of this court. There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction in the history of the jurisprudence and practice of the English Court of Chancery, if such a jurisdiction existed, and yet we find no precedents to direct us. A mistake of judgment in the assessors, upon the matter of fact, what portion or district of the city was intended to be and actually was benefited by the common sewer, can hardly be brought within the reach of that

head of equity jurisdiction which relates to breaches of trust. Here is not, strictly speaking, a violation of duty. No bad faith or partiality in the assessors is pretended. The aid of this court might as well be asked to review every assessment of a land tax or a poor rate. I apprehend it would require a special provision by statute to authorize chancery to interfere with these assessments." And see *Attorney-General v. Foundling Hospital*, 4 Bro., 165, and *Haight v. Day*, 1 Johns. Ch., 18.

<sup>53</sup> *Porter v. Rockford*, R. I. & St. L. R. Co., 76 Ill., 561; *Republic Life Ins. Co. v. Pollack*, 75 Ill., 292; *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill., 27, 18 N. E., 827, 11 Am. St. Rep., 90; *Kochersperger v. Larned*, 172 Ill., 86, 49 N. E., 988; *Kinley Mfg. Co. v. Kochersperger*, 174 Ill., 379, 51 N. E., 648; *Burton Stock Car Co. v. Traeger*, 187 Ill., 9, 58 N. E., 418; *Ayers v. Widmayer*, 188 Ill., 121, 58 N. E., 956; *Wells, Fargo & Co. v. Crawford County*, 63 Ark., 576, 40 S. W., 710, 37 L. R. A., 371; *Collins v. City of Keokuk*, 118 Iowa, 30, 91 N. W., 791; *St. Louis L. I. M. & S. R. Co. v. Worthen*, 52 Ark., 529, 13 S. W., 254. See also *International & G. N. R. Co. v. Smith County*, 54 Tex., 1. But in Oklahoma it is held that where a board of equalization raises the assessment of a taxpayer's property over and above its fair cash value,

§ 491. **Remedy at law; irreparable injury; insolvency of assessor.** It is also to be observed that in cases where the grounds for relief against the tax consist of alleged irregularities and illegalities, which appear fully of record, and a complete remedy exists at law, either by *certiorari* to an inferior court having jurisdiction over the levy of the tax, or by prohibition to prevent that court from making an illegal levy, equity will not interpose by injunction, but will leave the parties aggrieved to pursue the legal remedy. And if, in such case, the bill fails to negative the remedy at law, and presents no reasons for not pursuing that remedy, it is demurrable.<sup>54</sup> And upon like principles equity will not entertain a bill for an injunction to restrain the enforcement of a tax which is alleged to be illegal, when a plain and adequate remedy exists at law by application for an abatement of the tax.<sup>55</sup> Nor will equity restrain the enforcement of a tax where the taxpayer has a statutory right of appeal to the court for the purpose of having the assessment revised, of which he has failed to avail himself.<sup>56</sup> Nor will relief be granted where there is a remedy at law by payment of the tax under protest and suing to recover it.<sup>57</sup> Nor will equity restrain the prosecution of a pending action at law instituted for the purpose of enforcing the collection of taxes, upon grounds which may be raised as a defense to that proceeding.<sup>58</sup> Nor will the collection of a tax be enjoined in any case when it is not shown that the injury

the portion of the tax based upon such increased assessment will be enjoined. *Cranmer v. Williamson*, 8 Okla., 683, 59 Pac., 249.

<sup>54</sup> *Floyd v. Gilbreath*, 27 Ark., 675; *Murphy v. Harbison*, 29 Ark., 340. *Contra*, *Alexander v. Henderson*, 105 Tenn., 431, 58 S. W., 648.

<sup>55</sup> *Rockingham Savings Bank v. Portsmouth*, 52 N. H., 17; *Brown v. Concord*, 56 N. H., 375. See, *contra*, *Barr v. Deniston*, 19 N. H., 170.

<sup>56</sup> *Pittsburg, etc. Ry. v. Board of Public Works*, 172 U. S., 32, 19 Sup. Ct. Rep., 90.

<sup>57</sup> *Arkansas Building Assn. v. Madden*, 175 U. S., 269, 20 Sup. Ct. Rep., 119; *Robinson v. City of Wilmington*, 13 C. C. A., 177, 65 Fed., 856.

<sup>58</sup> *Scottish Union & National Insurance Co. v. Bowland*, 196 U. S., 611, 25 Sup. Ct. Rep., 345.

resulting from its enforcement would be irreparable, and this fact must distinctly appear by issuable averments.<sup>59</sup> And where the tax collector and his sureties are able to respond in damages, there being no averments of irreparable injury, the complaining taxpayer will be denied relief by injunction against the collection of the tax, and will be left to pursue his legal remedy for the trespass.<sup>60</sup> Nor will mere general averments in the bill of the inadequacy of the remedy at law, or that irreparable injury will be sustained by the sale of complainant's property for taxes, suffice to warrant an injunction, but the facts must be stated upon which the court can determine whether such averments are true.<sup>61</sup> And it will not suffice to allege merely in general terms that the taxes in question were levied for illegal or unauthorized purposes, but the facts must be set forth so that the court may determine whether such purposes are illegal or unauthorized.<sup>62</sup> Nor will the alleged insolvency of the assessor of itself justify a court of equity in extending its preventive aid by injunction against the enforcement of the tax.<sup>63</sup>

§ 492. **Further illustrations of the general doctrine.** In cases of mere non-compliance with some particular direction of the statute, aside from which the tax is sufficiently regular, or where the irregularities relate only to the time in which the different steps were taken, and do not affect the principle of taxation or the groundwork of the proceedings, relief in equity will not be allowed, such irregularities being regarded as merely technical defects, which, while they can never be wholly avoided, do not go to the merits of the proceedings.<sup>64</sup>

<sup>59</sup> *Ritter v. Patch*, 12 Cal., 298;

<sup>63</sup> *Wells v. Dayton*, 11 Nev., 161.

*Coulson v. Harris*, 43 Miss., 728.

<sup>64</sup> *Mills v. Gleason*, 11 Wis., 470;

<sup>60</sup> *Ritter v. Patch*, 12 Cal., 298.

*Mills v. Johnson*, 17 Wis., 598;

See also *Anthony v. Sturgis*, 86 Ind., 479.

*Wisconsin Central R. Co. v. Ash-*

*land County*, 81 Wis., 1, 50 N. W.,

<sup>61</sup> *Wells v. Dayton*, 11 Nev., 167.

937. And see *Canfield v. Bayfield*

<sup>62</sup> *Mace v. Commissioners*, 99 N. C., 65, 5 S. E., 740.

*County*, 74 Wis., 60, 41 N. W., 437, 42 N. W., 100.

Nor will alleged irregularities in the sale of lands for taxes afford ground for the interference of equity to restrain the purchaser from afterward selling the same lands, the two sales being entirely independent of and distinct from each other.<sup>65</sup> So a tax will not be enjoined because of its alleged illegality, when it is not shown that its enforcement would lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud upon the title to real estate.<sup>66</sup> And it is not sufficient ground for relief to allege that a tax sale, if allowed to proceed, would involve the owner of the property in litigation with purchasers, since probabilities of that nature are too remote to warrant a court of equity in interposing by injunction to restrain the collection of the public revenue.<sup>67</sup> Nor will a court interfere by injunction in advance of any steps by the proper officers for the levying or collection of the tax complained of, and merely upon complainant's fears that it may be levied in the future.<sup>68</sup>

§ 493. **Boards of review or equalization, their action not revised in equity; mandamus; when appeal to board unnecessary.** In many of the states of this country different tribunals or boards of equalization are provided by law, whose functions consist in hearing complaints of persons aggrieved, adjusting inequalities among different taxpayers and equalizing the burdens of taxation among the different persons subject thereto. And questions of much practical importance frequently occur in determining how far the action of such boards or officers may form the foundation for relief by injunction against the enforcement of taxation. The fundamental principle applicable to such cases is, that a court of equity is not a court of errors to review the acts of public officers in the

<sup>65</sup> *St. Louis v. Goode*, 21 Mo., 65; *Dean v. Davis*, 51 Cal., 406; 216. *Oregon, etc., Ry. Co. v. Standing*,

<sup>66</sup> *Savings & Loan Society v. 10 Utah*, 452 37 Pac., 687.

*Austin*, 46 Cal., 415; *Houghton v. 67 Savings & Loan Society v. Austin*, 47 Cal., 646; *Central Pacific R. Co. v. Corcoran*, 48 Cal., *Austin*, 46 Cal., 415.

<sup>68</sup> *Bridge Company v. Commis-*



assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly.<sup>69</sup> Where, therefore, a particular manner is provided by law, or a particular tribunal designated, for the settlement and decision of all errors or inequalities in behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax. And this upon the ground that where one has a complete and ample remedy at law and slumbers upon his rights, he is estopped from invoking the aid of equity.<sup>70</sup> And where a state board for the equalization of taxes, acting under the law and within the scope of their authority, have fixed the value of the capital stock and franchises of a corporation for purposes of taxation, although they may have erred in judgment, their action can not be impeached except for fraud, and equity will not enjoin proceedings for the enforcement of the tax because of errors in judgment upon the part of such board.<sup>71</sup> While, therefore, in such case, if the valuation were

sioners of Wyandotte Co., 10 Kan., 326.

<sup>69</sup> *Albuquerque Bank v. Perea*, 147 U. S., 87, 13 Sup. Ct. Rep., 194; *Livingston v. Hollenbeck*, 4 Barb., 9; *Clinton, etc., Appeal*, 56 Pa. St., 315; *O'Neal v. Virginia B. Co.*, 18 Md., 1; *Porter v. Rockford. R. I. & St. L. R. Co.*, 76 Ill., 561; *Ottawa Glass Co. v. McCaleb*, 81 Ill., 556; *Traders Ins. Co. v. Farwell*, 102 Ill., 413; *Texas & P. R. Co. v. Harrison Co.*, 54 Tex., 119; *McIntyre v. Town of White Creek*, 43 Wis., 620. And see *Heywood v. Buffalo*, 14 N. Y., 534; *Mayor v. Meserole*, 26 Wend., 132, reversing S. C., 8 Paige, 198; *Union Trust Co. v. Weber*, 96 Ill., 346; *National Bank v. Staats*, 155 Mo., 55, 55 S. W., 626.

<sup>70</sup> *Hughes v. Kline*, 30 Pa. St., 227; *Macklot v. Davenport*, 17 Iowa, 379; *Merrill v. Gorham*, 6 Cal., 41; *Peoria v. Kidder*, 26 Ill., 351; *West Portland Park v. Kelly*, 29 Ore., 412, 45 Pac., 901; *Oregon & Washington M. S. Bank v. Jordan*, 16 Ore., 113, 17 Pac., 624; *H. & T. C. R. Co. v. Presidio*, 53 Tex., 518; *Duck v. Peeler*, 74 Tex., 233, 11 S. W., 1111; *Northern Pac. R. Co. v. Patterson*, 10 Mont., 90, 24 Pac., 704; *First National Bank v. Bailey*, 15 Mont., 301, 39 Pac., 83; *Deloughrey v. Hinds*, 23 Mont., 260, 58 Pac., 709. See *Chisholm v. Adams*, 71 Tex., 678, 10 S. W., 336.

<sup>71</sup> *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill., 561; *Ottawa Glass Co. v. McCaleb*, 81 Ill., 556. And

so grossly excessive as to afford evidence of fraud in the action of the officers, equity might interfere, yet if the bill contains only general and argumentative averments, without giving the necessary *data* or facts from which the court can determine that there has been a grossly excessive valuation, the injunction will be denied.<sup>72</sup> And if the taxpayer may have adequate relief for excessive taxation by an appeal or application to a board of review or equalization, but neglects to avail himself of such remedy, he will be denied relief by injunction.<sup>73</sup> Or if a remedy exists by appeal from the action of the revising board, of which the taxpayer fails to avail himself, he will not be allowed the aid of an injunction.<sup>74</sup> And where an aggrieved taxpayer has made application for redress to a board of review but the latter has refused to hear or consider his complaint, equitable relief against the tax is properly refused because of his failure to exhaust his legal remedy by *mandamus* against the board.<sup>75</sup> If, however, the tax is levied upon property which is by law exempt from taxation, it is held that the statutory remedy by application to a board of review is only cumulative, and that the taxpayer may, at his election, seek his remedy by injunction in the first instance.<sup>76</sup> And where the function of a statutory board of equalization is merely to correct errors in the valuation of property which has been properly assessed, it is not necessary to appeal to such board where it is sought to enjoin a tax upon the ground that it is

see *Pacific Hotel Co. v. Lieb*, 83 N. E., 988; *Kinley Mfg. Co. v. Ill.*, 602; *Union Trust Co. v. Kochersperger*, 174 Ill., 379, 51 N. E., 648; *New Haven Clock Co. v. Weber*, 96 Ill., 346.

<sup>72</sup> *Pacific Hotel Co. v. Lieb*, 83 Ill., 602.

<sup>73</sup> *Meyer v. Rosenblatt*, 78 Mo., 495.

<sup>74</sup> *Preston v. Johnson*, 104 Ill., 625.

<sup>75</sup> *Beidler v. Kochersperger*, 171 Ill., 563, 49 N. E., 716; *Kochersperger v. Larned*, 172 Ill., 86, 49

N. E., 988; *Kinley Mfg. Co. v. Kochersperger*, 174 Ill., 379, 51 N. E., 648; *New Haven Clock Co. v. Kochersperger*, 175 Ill., 383, 51 N. E., 629; *White v. Raymond*, 188 Ill., 298, 58 N. E., 976; *Coxe Bros. & Co. v. Salomon*, 188 Ill., 571, 59 N. E., 422; *Standard Oil Co. v. Magee*, 191 Ill., 84, 60 N. E., 802.

<sup>76</sup> *Illinois Central R. Co. v. Hodges*, 113 Ill., 323.

entirely without authority of law, as where the property has been listed and taxed in another county or is exempt from taxation.<sup>77</sup>

§ 494. **Fraudulent conduct or excess of authority by board of equalization ground for injunction.** Notwithstanding the well established doctrine as above discussed, denying any supervisory power in courts of equity to revise the action of boards of review or equalization charged with the duty of revising and equalizing valuations and assessments, there have been instances of equitable interference by injunction to prevent the enforcement of taxes based upon such arbitrary, illegal or oppressive action upon the part of these boards as to amount to a fraud against the taxpayer, or to threaten a cloud upon his title, thereby bringing the case within the established jurisdiction of courts of equity.<sup>78</sup> And where a state board for the equalization of taxes undertakes to fix valuations upon taxable property through prejudice or a reckless disregard of duty, and makes a grossly arbitrary and unreasonable valuation, an injunction is regarded as the appropriate remedy.<sup>79</sup>

<sup>77</sup> *Court v. O'Connor*, 65 Tex., 334; *Davis v. Burnett*, 77 Tex., 3, 13 S. W., 613.

<sup>78</sup> *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill., 591; *Paul v. Pacific R. Co.*, 4 Dill., 35; *South Platte Land Co. v. Buffalo Co.*, 7 Neb., 253. And see *Wiley v. Flournoy*, 30 Ark., 609; *Pacific Hotel Co. v. Lieb*, 83 Ill., 602.

<sup>79</sup> *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill., 591. The court, Mr. Justice Scholfeld delivering the opinion, says, p. 592: "If, as it must be to be sustained, the rule adopted by the board of equalization by which to be governed in making this class of assessments, may be regarded as the honest expression of judgment of a majority of the

board, then it is plain that this assessment, because in violation of that rule and consistent with no other reasonable theory of valuation, can not be the honest judgment of a majority of that board. It is an arbitrary and unreasonable valuation. Because the law has devolved on the board of equalization, and not on the courts, the duty of making such valuations, we hold it is not the duty of the courts to exercise any supervisory care over its valuations so long as it acts within the scope of the powers with which it is invested, and in obedience to what might reasonably be presumed to be an honest judgment, however much we may disagree with it. But

So where a state board of equalization had exceeded its jurisdiction, which was limited to equalizing the aggregate valuation of county boards, and had acted as an original assessing body and had made an assessment *de novo*, an injunction was granted against the collection of the tax thus assessed which was in excess of the aggregate amount fixed by the county boards.<sup>80</sup> So where a state board of tax commissioners possessed no original jurisdiction in the assessment of property but only by way of appeal, their assumption of such jurisdiction is void, and a tax based upon an increase in an assessment made by them will be enjoined.<sup>81</sup> And where, after the adjournment of a board of equalization without making any change in the valuation of the lands in controversy, a change is subsequently made without authority of law, increasing the valuation, an injunction may be allowed against the extension of the tax upon the tax books. In such case the relief is proper for the purpose of preventing a cloud upon title, since the legality of the assessment would not necessarily appear upon the face of a tax deed, and the deed would therefore constitute a cloud upon the title to complainant's land.<sup>82</sup> So where a board of county officers, acting as a board of equalization, have made a new and largely increased assessment of complainants' lands, without authority and without notice or opportunity to be heard, such unauthorized action is held to warrant an injunction against the tax.<sup>83</sup> And the especial ground for relief in

whenever the board undertakes to go beyond its jurisdiction, or to fix valuations through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere to protect tax payers against the consequences of its acts. Where its jurisdiction is conceded no mere difference of opinion as to the

reasonableness of its valuations will justify equitable interference, but its valuations must be the result of honest judgment, and not of mere will."

<sup>80</sup> *Paul v. Pacific R. Co.*, 4 Dill., 35.

<sup>81</sup> *Eaton v. Union County Bank*, 141 Ind., 136, 40 N. E., 668.

<sup>82</sup> *Wiley v. Flournoy*, 30 Ark., 609.

<sup>83</sup> *South Platte Land Co. v. Buf-*

such case is found in the fact that the proceedings are regular upon their face, but require extrinsic evidence to show their invalidity, and they therefore threaten a cloud upon complainants' title.<sup>84</sup>

§ 495. **Want of notice to taxpayer of increased valuation.**

As regards the question of want of notice to the taxpayer before an increase of his assessment at the hands of a revisory board, the authorities are not altogether uniform. Thus, it has been broadly held that where an assessment of personal property has been reduced by a town board of revision, and afterward raised to the original amount by a county board of supervisors without notice of their intended action to the property owner, the tax is, to the extent of such increase, an unauthorized assessment by persons having no authority, and as such it may be enjoined.<sup>85</sup> So where the taxpayer is entitled by law to an examination of the assessment roll and to a hearing as to the correctness of his assessment, and this right is denied him, it is held that an injunction will lie to prevent the collection of the tax.<sup>86</sup> And when the valuation has been largely increased by a board of county officers, without notice to the taxpayer and without opportunity to be heard, an injunction has been allowed as to the taxes assessed upon the excess over the original valuation.<sup>87</sup> And where a taxpayer has delivered a schedule of his taxable property to the assessor by whom it has been accepted and the assessment made, the board of review has no power to increase such valuation without notice, and the extension or collection of a tax based upon such unauthorized increase will be enjoined.<sup>88</sup> Nor is it necessary in such case to show that the unauthorized assess-

falo Co., 7 Neb., 253; *McConkey v. Smith*, 73 Ill., 313.

<sup>84</sup> *South Platte Land Co. v. Buffalo Co.*, 7 Neb., 253.

<sup>85</sup> *Darling v. Gunn*, 50 Ill., 424.

<sup>86</sup> *Woodman v. Attorney-General*, 52 Mich., 28, 17 N. W., 227.

<sup>87</sup> *County Commissioners v. Union Mining Co.*, 61 Md., 545.

<sup>88</sup> *Huling v. Ehrich*, 183 Ill., 315, 55 N. E., 636; *Cox v. Hawkins*, 193 Ill., 68, 64 N. E., 1093.



ment is in excess of the fair valuation of the property since the defect is jurisdictional.<sup>89</sup> And where a board of county commissioners, acting without notice to the taxpayer, has ordered an increase in plaintiff's assessment as made by the assessor and accepted by the board of equalization, a tax based upon such increase is illegal and void and its enforcement will be enjoined.<sup>90</sup> And in such case the fact that the plaintiff subsequently appears before the board and seeks to have the tax reduced is no waiver of the want of notice or of the right to equitable relief.<sup>91</sup> Upon the other hand, it is held that while it may be the duty of a board of review to notify a resident taxpayer before increasing the assessor's valuation of his property, the failure to give such notice is not a jurisdictional defect which renders the tax void, but at the most a mere irregularity not available for purposes of relief in a court of equity, when it does not work a substantial injustice to the person aggrieved. Where, therefore, such want of notice does not result in injustice, the valuation of the property as fixed by the board not being in excess of its actual valuation as required to be assessed by law, and not being disproportionate to other valuations in the same town, no sufficient ground is presented for relief by injunction.<sup>92</sup> And where a statute provided that an assessment should not be raised without notice or an opportunity to be heard, and further prescribed the time for the meeting of the board of equalization, the statute was held to be notice not only of the meeting of the board but of all adjournments, even though *sine die*, and an injunction was therefore refused against a tax founded upon

<sup>89</sup> *Huling v. Ehrich*, 183 Ill., 315, 55 N. E., 636; *Mercantile National Bank v. Hubbard*, 45 C. C. A., 66, 105 Fed., 809. Kan., 360, 25 Pac., 854; *Topeka W. S. Co. v. Roberts*, 45 Kan., 363, 25 Pac., 855.

<sup>90</sup> *Commissioners of Leavenworth Co. v. Lang*, 8 Kan., 284; *Topeka City Ry. Co. v. Roberts*, 45

<sup>91</sup> *Topeka City Ry. Co. v. Roberts*, 45 Kan., 360, 25 Pac., 854.

<sup>92</sup> *McIntyre v. Town of White Creek*, 43 Wis., 620.

an increase in plaintiff's assessment which was made with no notice other than that of the statute.<sup>93</sup>

§ 496. **Unconstitutionality of law, conflict of authority.** Upon the question of the unconstitutionality of a tax, or of the law under which it is imposed, as affording ground for equitable relief by injunction against its enforcement, the decisions of the courts have been far from harmonious. The rule has been broadly asserted that if the law under which the tax is imposed is in conflict with the constitution of the state, a court of equity may entertain jurisdiction by injunction to prevent the enforcement and collection of the tax.<sup>94</sup> And where the legislature of the state, acting in violation of the constitution, has appointed certain officers and organized them into a private corporation known as drainage commissioners, and has vested them with the power of assessing taxes, such assessments being in violation of the constitution of the state, the issuing of tax deeds upon sales of land made for non-payment of such assessments has been enjoined.<sup>95</sup> So proceedings under a tax have been enjoined because in violation of a constitutional provision requiring uniformity in the rate of taxation.<sup>96</sup> The decided weight of authority, however, supports the doctrine that the unconstitutionality of the law under which a tax is imposed does not justify relief by injunction against its enforcement. The collection of the tax, under such circumstances, is regarded as a simple tort or trespass, susceptible of compensation in damages at law, and since relief by injunction against a tort rests wholly upon the inadequacy

<sup>93</sup> *Lander v. Mercantile Bank*, 186 U. S., 458, 22 Sup. Ct. Rep., 908, reversing S. C., 55 C. C. A., 523, 118 Fed., 785, and affirming S. C., 98 Fed., 465.

In *Mercantile National Bank v. Hubbard*, 45 C. C. A., 66, 105 Fed., 809, the Court of Appeals had previously taken the view that the statute in question was

not notice where the adjournment was without day, and they accordingly held that the plaintiff was entitled to relief.

<sup>94</sup> *Bristol v. Johnson*, 34 Mich., 123; *Kerr v. Wooley*, 3 Utah, 456, 24 Pac., 831.

<sup>95</sup> *Gage v. Graham*, 57 Ill., 144.

<sup>96</sup> *Knowlton v. Supervisors*, 9 Wis., 410.

of the legal remedy, the fact that the law under which defendant is about to proceed in the collection of the tax is unconstitutional and void will not justify a court of equity in extending relief by injunction.<sup>97</sup> In this apparent want of uniformity in the decisions of the courts, the better doctrine is believed to be that which makes the right to relief by injunction in such cases conditional upon the inadequacy of the remedy at law. And, indeed, there is express authority for holding that where the tax is unconstitutional, and no adequate remedy exists at law, and where the injury from its enforcement would prove irreparable, and would threaten the destruction of complainant's franchise, an injunction may properly be granted.<sup>98</sup> So

<sup>97</sup> *Shelton v. Platt*, 139 U. S., 591, 11 Sup. Ct. Rep., 646, reversing S. C., 39 Fed., 712; *Allen v. Car Co.*, 139 U. S., 658, 11 Sup. Ct. Rep., 682; *Pacific Express Co. v. Seibert*, 142 U. S., 339, 12 Sup. Ct. Rep., 250, affirming S. C., 44 Fed., 310; *Arkansas Building Assn. v. Madden*, 175 U. S., 269, 20 Sup. Ct. Rep., 119; *Indiana Mfg. Co. v. Koehne*, 188 U. S., 681, 23 Sup. Ct. Rep., 452; *Mechanics Bank v. Debolt*, 1 Ohio St., 591; *Exchange Bank v. Hines*, 3 Ohio St., 1; *United Lines T. Co. v. Grant*, 137 N. Y., 7, 32 N. E., 1005; *Blue Jacket C. C. Co. v. Scherr*, 50 West Va., 533, 40 S. E., 514. See also *North Carolina R. Co. v. Commissioners*, 82 N. C., 259; *Crawford v. Bradford*, 23 Fla., 404, 2 So., 782; *People v. District Court of the Tenth Judicial District*, 29 Col., 182, 68 Pac., 242. In *Exchange Bank v. Hines*, 3 Ohio St., 1, Bartley, C. J., delivering the opinion of the court, says: "The bill seeks relief against an alleged threatened trespass, and avers the defendant's pecuniary inability to respond in adequate damages. If the law under which the defendant is about to proceed be wholly unconstitutional and void, as is alleged in the bill, the defendant would be liable to damages in an action at law, to the extent of the injury which might be done to the complainant by the threatened wrong. Equitable relief by injunction against a tort rests wholly upon the inadequacy of the remedy at law. It is well settled that a court of chancery will not interfere by injunction to prevent a simple trespass, susceptible of compensation in damages in a proceeding at law, whether about to be committed in the pretended collection of a tax, or otherwise; and to authorize the interference of this extraordinary power there must be a case of apparent imminent danger of great and irreparable damage, for which an action at law would not furnish full indemnity. *Mechanics Bank v. Debolt*, 1 Ohio St., 591."

<sup>98</sup> *Foote v. Linck*, 5 McLean, 616.

the relief may be granted upon the ground of the unconstitutionality of the law where the pursuit of the legal remedy would subject the taxpayer to the burden of a multiplicity of suits.<sup>99</sup>

§ 497. **Payment or tender of legal tax a condition to relief.**

No principle of the law of injunctions is more firmly established than that requiring a taxpayer who seeks the aid of an injunction against the enforcement or collection of a tax, to first pay or tender the amount which is conceded to be legally and properly due. Applying the maxim that he who would have equity must first do equity, the courts have almost uniformly required, where a definite portion of the tax was conceded to be justly due and payable, that the complaining taxpayer should first pay or tender the amount admitted to be due, before extending preventive relief by injunction as to the residue. Where, therefore, complainant has not paid that portion of the tax which is clearly valid, to which no objection is offered, and which may readily be distinguished from the illegal portion, the injunction will be denied, since the collection of a legal tax will never be restrained to prevent the enforcement of an illegal one, and since a court of equity will not lend its extraordinary aid by injunction to one who himself refuses to do equity.<sup>1</sup> And in all such cases the bill itself

<sup>99</sup> *Sanford v. Poe*, 16 C. C. A., 305, 69 Fed., 546, 60 L. R. A., 641. In this case the Court of Appeals, following the construction placed upon the law in question by the Supreme Court of Ohio, held the statute to be valid. They nevertheless recognize the rule as announced in the text.

<sup>1</sup> *Northern Pacific R. Co. v. Clark*, 153 U. S., 252, 14 Sup. Ct. Rep., 809; *Peoples National Bank v. Marye*, 191 U. S., 272, 24 Sup. Ct. Rep., 68; *State Railroad Tax Cases*, 2 Otto, 575; *Hersey v. Su-*

*pervisors*, 16 Wis., 185; *Bond v. Kenosha*, 17 Wis., 284; *Mills v. Johnson*, 17 Wis., 598; *Howes v. Racine*, 21 Wis., 514; *Mills v. Charleton*, 29 Wis., 400; *Kaehler v. Dobberpuhl*, 56 Wis., 480, 14 N. W., 644; *Palmer v. Napoleon*, 16 Mich., 176; *Merrill v. Humphrey*, 24 Mich., 170; *Pillsbury v. Humphrey*, 26 Mich., 245; *Taylor v. Thompson*, 42 Ill., 10; *Swinney v. Beard*, 71 Ill., 27; *Board of Commissioners v. Elston*, 32 Ind., 27; *Brown v. Herron*, 59 Ind., 61; *City of Delphi v. Bowen*, 61 Ind., 29;

must show what portion of the tax is legal and what illegal, in order that the court may be enabled to properly discriminate between them, and to determine what portion of the entire tax should be paid and what enjoined.<sup>2</sup> Nor is it a sufficient averment of payment or tender to allege that complainants are willing to pay, or that they will pay into court that portion of the tax which they admit to be due, and if the court can ascertain from the bill that any part of the tax ought to be paid, it will require actual payment or tender of such portion before inter-

Mulliken *v.* Reeves, 71 Ind., 281; Mesker *v.* Koch, 76 Ind., 68; Stilz *v.* City of Indianapolis, 81 Ind., 582; Board of Commissioners *v.* Dailey, 115 Ind., 360, 17 N. E., 619; Hyland *v.* C. I. & S. Co., 129 Ind., 68, 28 N. E., 308, 13 L. R. A., 515; Smith *v.* Rude Bros. Mfg. Co., 131 Ind., 150, 39 N. E., 47; Smith *v.* Bank, 131 Ind., 201, 39 N. E., 48; Thiebaud *v.* Tait, 138 Ind., 238, 36 N. E., 525; County Commissioners *v.* Union Mining Co., 61 Md., 545; Brown *v.* School District, 12 Ore., 345, 7 Pac., 357; Welch *v.* Clatsop County, 24 Ore., 452, 33 Pac., 934; Dayton *v.* Multnomah County, 34 Ore., 239, 55 Pac., 23; Alliance Trust Co. *v.* Multnomah County, 38 Ore., 423, 63 Pac., 498; Huntington *v.* Palmer, 7 Sawyer, 355; Burlington & M. R. Co. *v.* York Co., 7 Neb., 487; Iler *v.* Colson, 8 Neb., 331; London *v.* City of Wilmington, 78 N. C., 109; Covington *v.* Town of Rockingham, 93 N. C., 134; Rio Grande R. Co. *v.* Scanlan, 44 Tex., 649; Blanc *v.* Meyer, 59 Tex., 89; Rosenberg *v.* Weekes, 67 Tex., 578, 4 S. W., 899; Over-all *v.* Ruenzi, 67 Mo., 203; Burnham *v.* Rogers, 167 Mo., 17, 66 S. W., 970; Parmley *v.* Railroad Companies, 3 Dill., 25; City of Ottawa *v.* Barney, 10 Kan., 270; City of Lawrence *v.* Killam, 11 Kan., 499; Hagaman *v.* Commissioners of Cloud Co., 19 Kan., 394; Wilson *v.* Longendyke, 32 Kan., 267, 4 Pac., 361; Tallassee Manufacturing Co. *v.* Spigener, 49 Ala., 262; Alabama Gold Life Ins. Co. *v.* Lott, 54 Ala., 499; City Council *v.* Sayre, 65 Ala., 564; Worthen *v.* Badgett, 32 Ark., 496; Wells, Fargo & Co. *v.* Crawford County, 63 Ark., 576, 40 S. W., 710, 37 L. R. A., 371; Quint *v.* Hoffman, 103 Cal., 506, 37 Pac., 514; Collins *v.* Green, 10 Okla., 244, 62 Pac., 813; Lasater *v.* Green, 10 Okla., 335, 62 Pac., 816; Halff *v.* Green, 10 Okla., 338, 62 Pac., 816; Russell *v.* Green, 10 Okla., 340, 62 Pac., 817; Blue Jacket C. C. Co. *v.* Scherr, 50 West Va., 533, 49 S. E., 514.

<sup>2</sup> Palmer *v.* Napoleon, 16 Mich., 176; Taylor *v.* Thompson, 42 Ill., 10. But in *Briscoe v. Allison*, 43 Ill., 291, it is held that whenever the court can ascertain from the bill the proportion which the illegal bears to the legal tax, the former should be enjoined and the latter collected.



fering.<sup>3</sup> And it has even been held that where the tender is refused by the tax collector, it must be made good by payment into court of the amount due.<sup>4</sup> Nor is it sufficient to aver in the bill that complainants are ready and willing to pay whatever amount may be found to be due.<sup>5</sup> Nor is a mere offer to do equity enough.<sup>6</sup> And an allegation that complainant has paid all taxes which he is legally liable to pay is not sufficient within the meaning of the rule, since it is only an averment of a legal conclusion and not of a fact. The bill should, therefore, in all cases allege the facts and particulars which will enable the court to determine whether the legal conclusion is warranted by the facts.<sup>7</sup> And the general doctrine under discussion has even been carried to the extent of requiring, where the valid and the void taxes are separable, and the amount of the valid tax can be readily ascertained, that complainant should actually pay the legal as a condition precedent to relief against the illegal tax.<sup>8</sup> The courts have not, however, in all cases required actual payment of the legal tax before granting relief as to the residue, but have generally regarded a tender of payment as sufficient, although it is not doubted that it is within the power of a court of equity to require actual payment as a condition precedent to granting relief.<sup>9</sup> And where

<sup>3</sup> *Parmley v. Railroad Companies*, 3 Dill., 25; *Bank v. Ferris*, 55 Kan., 120, 39 Pac., 1042. But see *City of Meridian v. Ragsdale*, 67 Miss., 86, 6 So., 619.

<sup>4</sup> *Bundy v. Summerland*, 142 Ind., 92, 41 N. E., 322.

<sup>5</sup> *State Railroad Tax Cases*, 2 Otto, 575.

<sup>6</sup> *Chicago, B. & Q. R. Co. v. Board of Commissioners*, 14 C. C. A., 458, 67 Fed., 413.

<sup>7</sup> *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala., 499; *Insurance Co. v. Bouner*, 24 Col., 220, 49 Pac., 366.

<sup>8</sup> *Mills v. Johnson*, 17 Wis., 598; *City of Lawrence v. Killam*, 11

Kan., 499. And it is held in Indiana, that when any portion of the tax which it is sought to enjoin is actually due, it should be paid or tendered before the commencement of the suit for an injunction. *Brown v. Herron*, 59 Ind., 61; *City of Delphi v. Bowen*, 61 Ind., 29. But in *Clement v. Everest*, 29 Mich., 19, it is held that when the bill shows the exact amount of the illegal and excessive tax, and only seeks to enjoin such excess, the objection that it does not tender payment of the legal tax is of no force.

<sup>9</sup> See *Mills v. Charleton*, 29 Wis.,

the plaintiff makes a tender in good faith believing it to be the amount due but it appears he is mistaken in the amount and the tender is insufficient, the bill should not be dismissed but the plaintiff should be given an opportunity to amend and make tender of the correct amount.<sup>10</sup> And when the tax is justly and legally due from the property owner, he will not be allowed to enjoin the issuing of a tax deed under a sale for non-payment of such tax, without first paying or tendering to the purchaser the amount of the tax actually paid by him.<sup>11</sup> And it has been held that, to warrant relief against the collection of a tax claimed to be void, the plaintiff must allege and prove that the property was listed and returned for assessment at its true cash value.<sup>12</sup>

§ 498. **The rule illustrated; not applicable to entire illegal assessment.** In conformity with and as illustrating the general doctrine as above stated, it is held that a bill in equity which seeks to enjoin the enforcement of taxes, but which makes no distinction between those which are properly assessed and those which are presumed to have been assessed without authority of law, and which seeks to enjoin the whole, can not be entertained. And that portion of the tax which is legal should first be paid before equity can properly interfere to restrain the illegal portion, since otherwise the collection of the entire tax might be delayed by a litigation which might in reality involve but an inconsiderable portion of the amount justly due.<sup>13</sup> So where it is sought to enjoin the

400; *Dean v. Borchsenius*, 30 Wis., 237.

<sup>10</sup> *Chicago, B. & Q. R. Co. v. Board of Commissioners*, 14 C. C. A., 458, 67 Fed., 413.

<sup>11</sup> *Whitehead v. Farmers' Loan & Trust Co.*, 39 C. C. A., 34, 98 Fed., 10; *Moore v. Wayman*, 107 Ill., 192; *Harrison v. Haas*, 25 Ind., 281; *Rowe v. Peabody*, 102 Ind., 198. And it is held in Indiana, that the property owner, in such

case, must keep his tender good by bringing the money into court, and that an averment of his willingness to pay is insufficient. *Morrison v. Jacoby*, 114 Ind., 84, 14 N. E., 546, 15 N. E., 806. And see *Hewett v. Fenstemaker*, 128 Ind., 315, 27 N. E., 621.

<sup>12</sup> *Alva State Bank v. Renfrew*, 10 Okla., 26, 62 Pac., 285.

<sup>13</sup> *Tallasse Manufacturing Co. v. Spigener*, 49 Ala., 262.

collection of an entire tax upon the ground, among others, that the law under which it is levied fails to make provision for proper deductions and it appears upon the face of the pleadings what deductions should have been allowed, the failure to pay the amount equitably due is good ground for refusing an injunction; but in such case the court may direct that the dismissal of the bill be without prejudice in order that the plaintiff may, if he so elect, pay what is equitably due and then institute further proceedings.<sup>14</sup> So where a county clerk in extending uncollected taxes of previous years with those of the current year, has computed interest on such back taxes at a higher rate than that allowed by law, the excess will not be enjoined when the bill does not aver payment or a readiness to pay the amount legally due.<sup>15</sup> And where it is sought to enjoin taxes levied for a given year upon the ground that the county officers have exceeded their authority by levying a greater percentage upon the valuation of property than they were authorized by law to do, such excess being levied to pay a judgment rendered against the county for the expenses of previous years, it is error to grant the injunction against the whole excess as an entirety, when the bill fails to show the amount of the tax levied in such previous years for the payment of the expenses of those years.<sup>16</sup> So an injunction will not lie to prevent the assignment of certificates of tax sales because of irregularities in assessing the lots in gross, levying the taxes in excess of the legal rates, and the want of sufficient notice of the time of sale, unless complainant shall first pay or tender the taxes which are justly due.<sup>17</sup> And the execution of a certificate of conveyance of lands for tax sales will not be enjoined unless complainant will pay all taxes which are legally due and chargeable upon the lands.<sup>18</sup> So a purchaser of lands

<sup>14</sup> *Peoples National Bank v. Marye*, 191 U. S., 272, 24 Sup. Ct. Rep., 68.      <sup>17</sup> *Hagaman v. Commissioners of Cloud Co.*, 19 Kan., 394.

<sup>15</sup> *Swinney v. Beard*, 71 Ill., 27.      <sup>18</sup> *Worthen v. Badgett*, 32 Ark., 496.

<sup>16</sup> *Commissioners of Osborne Co. v. Blake*, 19 Kan., 299.

at a foreclosure sale, since he takes the lands subject to unpaid taxes and assessments, can not, if such taxes are a legal incumbrance upon the lands, enjoin the issuing of a tax deed under a sale for such unpaid taxes without first tendering the full amount of taxes which are justly due.<sup>19</sup> And where it is sought to enjoin the placing upon the tax duplicate of an entire tax levy, a part of which is valid, the relief will be denied, since the requirement that the plaintiff do equity applies with the same force in such a case as in an action to enjoin the collection of a tax already upon the duplicate.<sup>20</sup> It is held, however, that the general rule requiring payment or tender of the amount actually due as a condition to equitable relief against the illegal portion of the tax, has no application to a case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed.<sup>21</sup> And the rule under discussion has no application where the tax or assessment is made upon a basis so false and unwarranted as to afford no *data* from which the amount of the tax properly chargeable may be determined.<sup>22</sup> And where the plaintiff is seeking to restrain not the collection of the tax itself but merely the extension of the tax upon an unauthorized increase in the plaintiff's assessment, the rule does not apply where the amount of the tax which is equitably due is not known at the time the suit was begun.<sup>23</sup>

<sup>19</sup> *Iler v. Colson*, 8 Neb., 331.

<sup>20</sup> *Shepardson v. Gillette*, 133 Ind., 125, 31 N. E., 788.

<sup>21</sup> *Marsh v. Supervisors of Clark Co.*, 42 Wis., 502; *Norwood v. Baker*, 172 U. S., 269, 293, 19 Sup. Ct. Rep., 187; *Peoples National Bank v. Marye*, 191 U. S., 272, 24 Sup. Ct. Rep., 68; *Fargo v. Hart*, 193 U. S., 490, 24 Sup. Ct. Rep., 498; *Hyland v. Brazil B. C. Co.*, 128 Ind.,

335, 26 N. E., 672; *Yocum v. Bank*, 144 Ind., 272, 43 N. E., 231; *Bidwell v. Huff*, 103 Fed., 362; *Zehnder v. Barber Asphalt Co.*, 106 Fed., 103. And see *Morris v. Merrell*, 44 Neb., 423, 62 N. W., 865.

<sup>22</sup> *Howell v. City of Tacoma*, 3 Wash., 711, 29 Pac., 447, 28 Am. St. Rep., 83.

<sup>23</sup> *Cox v. Hawkins*, 199 Ill., 68, 64 N. E., 1093.

§ 499. **The rule as affected by legislation.** As regards the effect of legislation upon the question above discussed, where an act of legislature prohibits the granting of any injunction against the collection of certain taxes, unless plaintiff shall first pay all taxes remaining unpaid, whether regularly assessed or not, and further provides that if it shall appear upon the hearing that the amount paid by plaintiff was not the full amount justly chargeable upon his land, the action shall be dismissed, it is held that the statute applies only to proceedings to enjoin the collection of taxes irregularly assessed, and not to cases where relief is sought against taxes which are inherently unjust and inequitable. Such legislation, therefore, is not in derogation of the bill of rights in a state constitution, declaring that every person is entitled to a certain remedy in the laws for all injuries or wrongs that he may receive, and it will be upheld as constitutional. And under such a statute an action to enjoin the collection of the tax should be dismissed if it appears that that plaintiff has omitted to pay the taxes assessed which are not shown to be void upon the merits or unjust in principle, even though there are technical objections to the taxes assessed upon some of the lots or parcels.<sup>24</sup> And while, in such case, the fact that several lots or parcels were valued together, although owned by different persons and not occupied as one parcel, would if shown as to all the lots entitle plaintiff to an injunction, yet if shown only as to a part of the lots, the relief will be denied.<sup>25</sup>

§ 500. **Fraud as a ground for relief; when purged by appeal.** Fraud has been held a sufficient ground to warrant a court of equity in a departure from the general rule of non-interference with the collection of taxes. And an allegation of fraud in the levying of a tax for an unauthorized purpose is regarded as sufficient to give a court of equity jurisdiction.<sup>26</sup> Thus,

<sup>24</sup> *Whittaker v. City of Janesville*, 33 Wis., 76.

<sup>26</sup> *Leitch v. Wentworth*, 71 Ill., 146.

<sup>25</sup> *Id.*



where an assessor, having accepted without objection a list of taxable property, afterward and without notice arbitrarily increases the list, the taxpayer having no knowledge of the matter until after the time for redress at law has expired by limitation, the collection of the tax may be enjoined.<sup>27</sup> So the relief has been allowed against the enforcement of taxes imposed for the payment of judgments obtained through fraud and collusion.<sup>28</sup> And in such case, the persons to whom the illegal tax, if collected, would be paid are not necessary parties to the suit for the injunction.<sup>29</sup> But equity will not interpose to restrain the collection of a tax for the payment of judgments rendered against a municipal corporation, on the ground that the bonds on which the judgments were founded were without consideration, and were obtained by fraud, where such defense might have been pleaded to the action at law.<sup>30</sup> And where fraud is relied upon as a ground for relief against excessive taxation, the proof of fraud must be clear and irresistible, and the resulting injury must be a serious one.<sup>31</sup> Nor will the relief be allowed because the judgments are for an amount greater than that actually due, the mistake having occurred through complainant's carelessness, and no application having been made to correct the judgment in the court in which it was obtained.<sup>32</sup> But a fraudulent combination which has been entered into between bidders at a tax sale and the collector whose duty it is to sell, the purpose of such

<sup>27</sup> *Cleghorn v. Postlewaite*, 43 Ill., 428; *First National Bank of Shawneetown v. Cook*, 77 Ill., 622. But where the assessor has never accepted the valuation placed upon the property by the plaintiff and proceeds to place a higher valuation upon it without notice, the relief will be denied since there is no increase in the valuation adopted by the assessor. *Tolman v. Salomon*, 191 Ill., 202, 60 N. E., 809.

<sup>28</sup> *Newcomb v. Horton*, 18 Wis., 566; *Leitch v. Wentworth*, 71 Ill., 146.

<sup>29</sup> *Leitch v. Wentworth*, 71 Ill., 146.

<sup>30</sup> *Muscatine v. Mississippi & M. R. Co.*, 1 Dill., 536.

<sup>31</sup> *Union Trust Co. v. Weber*, 96 Ill., 346.

<sup>32</sup> *Muscatine v. Mississippi & M. R. Co.*, 1 Dill., 536.

combination being to prevent competition at the sale and to allow the property to be struck off to a particular purchaser, by reason of which all bidding at the sale is wholly prevented, is held to constitute sufficient ground for enjoining the issuing of tax deeds upon the certificates of such sales,<sup>33</sup> or the issuing of the certificates themselves.<sup>34</sup> And where, pending a litigation between a taxpayer and a county concerning taxes which have been levied upon plaintiff's property, a compromise is effected by which plaintiff is to pay a given sum in settlement, upon compliance with such agreement plaintiff may enjoin the collector from enforcing the taxes as originally assessed.<sup>35</sup> But where fraud upon the part of an assessor is relied upon as the basis for equitable relief against the collection of a tax, an appeal from the action of the assessor to the board of review is held to purge the original assessment of the taint of fraud where there is no showing that the reviewing board itself has been guilty of any improper or fraudulent conduct.<sup>36</sup>

§ 500 *a*. **Arbitrary discrimination in assessment.** The aid of equity is frequently invoked for relief against taxes where the assessor or assessing board has made an arbitrary or wilful discrimination against a taxpayer, whereby his property is assessed at a higher rate than other property subject to taxation; and in such cases injunctions are freely granted against the collection of a tax based upon such arbitrary or capricious valuation. Thus, where the officers intrusted by law with the duty of making an assessment have fraudulently assessed property above its real value, for the purpose of relieving resident taxpayers from their due proportion of the taxes, and have not exercised their judgment upon the valuation, but have arbitrarily made an excessive assessment, it is proper to enjoin

<sup>33</sup> *Gage v. Graham*, 57 Ill., 144.

<sup>36</sup> *Burton Stock Car Co. v. Trae-*

<sup>34</sup> *Glos v. Swigart*, 156 Ill., 229,  
41 N. E., 42.

*ger*, 187 Ill., 9, 58 N. E., 418. See  
*Spring Valley Coal Co. v. People*,

<sup>35</sup> *St. Louis, I. M. & S. R. Co. v.*  
*Anthony*, 73 Mo., 431.

157 Ill., 543, 41 N. E., 874.

the sale of lands for the excess in such assessment.<sup>37</sup> So relief will be granted where plaintiff's property has been assessed for taxation at its full valuation, as required by law, while all other property is assessed at only a fractional part of its full valuation.<sup>38</sup> And the relief is granted in such cases regardless of the question of motive or fraudulent intent upon the part of the assessing officer.<sup>39</sup> So also where an assessor has fraudulently and intentionally adopted a rule or system of valuation which is designed to operate unequally among different classes of taxpayers, thereby violating the fundamental requirements of uniformity of taxation, equitable relief is properly granted. Thus, where property consisting of mortgages upon real estate has been rated at its full valuation, while the mortgaged property itself is assessed at but one-fourth of such valuation, an injunction will be allowed against the enforcement of the tax.<sup>40</sup> So where an assessor has arbitrarily and fraudulently assessed plaintiff's property at a rate which is grossly excessive and which is entirely disproportionate to the rate at which like property owned by other persons has been valued, a case is presented for relief by injunction against the collection of the tax.<sup>41</sup> It is to be observed, however, that in all such cases the relief is not extended to the entire tax but only to that

<sup>37</sup> *Merrill v. Humphrey*, 24 Mich., 170; *California & O. Land Co. v. Gowen*, 48 Fed., 771.

<sup>38</sup> *Mercantile Natl. Bank v. Mayor*, 172 N. Y., 35, 64 N. E., 756; *Chicago, B. & Q. R. Co. v. Board of Commissioners*, 54 Kan., 781, 39 Pac., 1039; *Taylor v. L. & N. Co.*, 31 C. C. A., 537, 88 Fed., 350; *Railroad & Telephone Co. v. Board of Equalizers*, 85 Fed., 302. But where plaintiff's own property is assessed at but a fractional part of the full valuation required by law, the relief will be denied although all other property is as-

essed at a less rate. *Albuquerque Bank v. Perea*, 147 U. S., 87, 13 Sup. Ct. Rep., 194.

<sup>39</sup> *Mercantile Natl. Bank v. Mayor*, 172 N. Y., 35, 64 N. E., 756; *Chicago, B. & Q. R. Co. v. Board of Commissioners*, 54 Kan., 781, 39 Pac., 1039.

<sup>40</sup> *Andrews v. King County*, 1 Wash., 46, 23 Pac., 409, 22 Am. St. Rep., 136.

<sup>41</sup> *Oregon & Cal. R. Co. v. Jackson County*, 38 Ore., 589, 64 Pac., 307, 65 Pac., 369; *Pacific P. T. Co. v. Dalton*, 119 Cal., 604, 51 Pac., 1072.

portion of the tax which is based upon the assessment in excess of the rate at which other property is valued for taxation.<sup>42</sup> So also relief should be granted only upon the payment of the proportion of the tax which is justly due.<sup>43</sup> And where an aggrieved taxpayer has appealed to a board of equalization from an arbitrary and capricious assessment of the assessor, and the board, although granting partial relief, refuses to make the reduction claimed by the plaintiff, relief will be denied, even though the valuation made by the board may appear unduly high, where there is no charge that the board acted fraudulently or arbitrarily in arriving at their valuation.<sup>44</sup>

§ 501. **Omission of officer to take oath or to give bond.**

Upon the question of the effect of non-compliance by the officer charged with the duty of fixing the amount of or collecting a tax, with the formalities necessary to fully qualify him for his office, the authorities are not wholly uniform. Thus it has been held that where a tax is sought to be imposed for a work of public improvement, and the person designated by law to estimate the work and to audit the amount of each owner's tax is not sworn as required by law, the omission to take the oath will be treated as fatal to the collection of the tax, rendering it entirely void, and a demurrer to a bill seeking to enjoin such tax will, therefore, be overruled.<sup>45</sup> Upon the other hand, it would seem that the omission of an officer charged by law with the collection of a tax to properly qualify by giving the necessary bond required by law affords

<sup>42</sup> *Chicago, B. & Q. R. Co. v. son County*, 38 Ore., 589, 64 Pac., Board of Commissioners, 54 Kan., 307, 65 Pac., 369.  
<sup>43</sup> *Merrill v. Humphrey*, 24 Mich., 781, 39 Pac., 1039; *Mercantile Natl. Bank v. Mayor*, 172 N. Y., 35, 64 N. E., 756; *Taylor v. L. & N. R. Co.*, 31 C. C. A., 537, 88 Fed., 350; *Andrews v. King County*, 1 Wash., 46, 23 Pac., 409, 22 Am. St. Rep., 136; *Oregon & Cal. R. Co. v. Jack-*

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<sup>44</sup> *Southern Oregon Co. v. Coos County*, 39 Ore., 185, 64 Pac., 646.

<sup>45</sup> *Webb v. Cutsinger*, 48 Ind., 246.

no ground for enjoining the collection of the tax.<sup>46</sup> And upon principle it is difficult to perceive any satisfactory reason why the levying or collection of a tax by an officer *de facto*, whose acts are otherwise unquestioned, should be enjoined by reason of his omission to fully comply with the legal conditions requisite to the exercise of his official functions.<sup>47</sup>

§ 502. **Want of power, ground for injunction; former judgment sustaining tax.** A distinction is drawn between cases of an irregular exercise of the taxing power or of an informal assessment and levy, and cases where there is an entire absence of any exercise of the power and hence no valid assessment or levy. And in the latter class of cases, there being no exercise of the taxing power, what appears upon the tax records as a tax is illegal and void and its enforcement may be enjoined.<sup>48</sup> So if there is a total want of authority to levy the tax, relief by injunction may properly be allowed.<sup>49</sup> And in an action to enjoin the enforcement of taxes charged to be illegally assessed, it is a sufficient defense to show that the validity of the taxes in question was fully determined in a former action between the same parties to restrain the collection of such taxes.<sup>50</sup>

§ 503. **The Illinois doctrine.** It is the established doctrine in Illinois, that a tax will not be enjoined unless it is void,

<sup>46</sup> Hall v. Houston & T. C. R. Co., 39 Tex., 286.

<sup>47</sup> See Cooley on Taxation, 187, 190, 191, where the subject of the validity of the action of officers *de facto* is fully and exhaustively discussed, and the conclusion is reached by the learned author that the general policy of the law, as indicated by the clear and very strong preponderance of authority, is, that the acts of officers *de facto* should be sustained in tax cases under like circumstances and for the same imperative reasons which sustain them in other cases.

<sup>48</sup> Brandirff v. Harrison Co., 50 Iowa, 164. See also Décker v. McGowan, 59 Ga., 805; Savannah, F. & W. R'y v. Morton, 71 Ga., 24; Conner's Appeal, 103 Pa. St., 356.

<sup>49</sup> Town of Lebanon v. Ohio & M. R. Co., 77 Ill., 539; Kimball v. Merchants S. L. & T. Co., 89 Ill., 611; Allwood v. Cowen, 111 Ill., 481; Jones v. Davis, 35 Ohio St., 474. See also Simpkins v. Ward, 45 Mich., 559, 8 N. W., 507.

<sup>50</sup> Breeze v. Haley, 11 Col., 351, 18 Pac., 551.



or levied without authority of law, or unless the property is exempt from taxation, or unless there has been a fraudulent assessment at too high a rate.<sup>51</sup> And when the property taxed is liable to the tax imposed upon it and the law has authorized the tax to be imposed, and when it is levied by the persons designated by law for that purpose, equity will not interfere by injunction to prevent the enforcement of the tax. Stated in other words, the Illinois doctrine is, that equity will not enjoin a tax unless the property is exempt from taxation, or the tax is not authorized by law, or unless the persons imposing the tax have no power conferred upon them by law to make the levy.<sup>52</sup> Where, however, without authority of law, a tax levy is made in excess of the proper and uniform legal rate of taxation, the collection of such excess may properly be enjoined.<sup>53</sup> So where the jurisdiction of the assessing officer had previously ceased, the tax will be restrained.<sup>54</sup> So where a tax levied upon the property of one person is charged against another, the latter may restrain its enforcement.<sup>55</sup> And an injunction will lie to restrain, not only the collection of a tax levied by town officers for a purpose for which they could not legally make a levy, but the use of the money already collected.<sup>56</sup> So also equity will restrain the collection of a tax in excess of the two per cent. limitation provided by law.<sup>57</sup> So also where property is taxable in one town, relief will be

<sup>51</sup> *Munson v. Miller*, 66 Ill., 380; *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill., 561; *Ottawa Glass Co. v. McCaleb*, 81 Ill., 556; *Moore v. Wayman*, 107 Ill., 192; *Wabash, St. L. & P. R. Co. v. Johnson*, 108 Ill., 11; *New Haven Clock Co. v. Kochersperger*, 175 Ill., 383, 51 N. E., 629; *Earl & Wilson v. Raymond*, 188 Ill., 15, 59 N. E., 19; *Siegfried v. Raymond*, 190 Ill., 424, 60 N. E., 868.

<sup>52</sup> *Munson v. Miller*, 66 Ill., 380.

<sup>53</sup> *Ramsey v. Hoeger*, 76 Ill., 432;

*Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill., 561; *Chicago & N. W. R. Co. v. Miller*, 72 Ill., 144.

<sup>54</sup> *School Directors v. School Directors*, 135 Ill., 464, 28 N. E., 49.

<sup>55</sup> *Irvin v. Railroad Co.*, 94 Ill., 105; *Searing v. Heavysides*, 106 Ill., 85; *Condit v. Widmayer*, 196 Ill., 623, 63 N. E., 1078.

<sup>56</sup> *Town of Drummer v. Cox*, 165 Ill., 648, 46 N. E., 716.

<sup>57</sup> *Dollahon v. Whittaker*, 187 Ill., 84, 58 N. E., 301.

granted against a tax levied by the authorities of another town.<sup>58</sup> So when the tax levy is void because not made within the time prescribed by law, sufficient cause is presented for an injunction.<sup>59</sup> And in conformity with this general doctrine recognizing the right to enjoin taxes levied without authority of law, or levied upon property not subject to taxation, it is held that where back taxes for previous years have, without authority of law, been extended upon the assessment of the current year, relief by injunction may properly be allowed.<sup>60</sup> While it will thus be seen that the courts of Illinois have displayed a somewhat marked liberality in the granting of injunctions against the collection of taxes, the prevailing tendency at the present time would seem to be to restrict rather than to enlarge the jurisdiction and to adopt the adequacy of the legal remedy as the test as to the right to equitable relief.<sup>61</sup>

§ 504. **The Wisconsin doctrine.** In Wisconsin it has become the well established doctrine that the enforcement of a tax may be enjoined which has been assessed upon an improper or illegal basis, or when the statutory rule of valuation has been utterly disregarded or violated.<sup>62</sup> A valid assessment being regarded as the foundation of all proceedings requisite to a uniform rule of taxation, it is held that where the mode of assessment prescribed by law has been so violated or disregarded as to render the tax void, an appropriate cause is presented for equitable relief by injunction. Drawing a distinction between mere errors or mistakes of taxing officers, and a total disregard of the requirements of the law as to the assessment, it is held that, while in the former

<sup>58</sup> *Vogt v. Ayer*, 104 Ill. 583. And see, *post*, § 523 *b*.

<sup>59</sup> *First National Bank of Shawneetown v. Cook*, 77 Ill., 622.

<sup>60</sup> *Town of Lebanon v. Ohio & M. R. Co.*, 77 Ill., 539.

<sup>61</sup> See *Williams v. Dutton*, 184 Ill., 608, 56 N. E., 868.

<sup>62</sup> *Hersey v. Supervisors of Barron Co.*, 37 Wis., 75; *Salscheider v. City of Fort Howard*, 45 Wis., 519; *Schettler v. City of Fort Howard*, 43 Wis., 48; *Goff v. Supervisors of Outagamie Co.*, 43 Wis., 55.

class of cases sufficient ground may not exist for equitable interference, in the latter a court of equity may properly interpose its preventive relief against the enforcement of the tax. Where, therefore, the assessor is required by law to make a valuation from actual view of the premises, using his judgment with reference to each tract and its value, but he makes his valuation upon certain fixed and arbitrary rules in disregard of the statutory requirements, it is proper to enjoin the enforcement of the tax. The valuation being regarded as essential to lay the foundation for a lawful tax, where this is made in plain disregard and violation of the law, an injunction is deemed the appropriate remedy.<sup>63</sup> So where the assessor is required by law to assess property at the full value which it would ordinarily bring at private sale, but in disregard of the statute he makes the valuation upon the basis of one-third the value of the property, sufficient ground is presented for an injunction.<sup>64</sup> And where the assessor, disregarding the statute which requires him to assess lands at the full value which they would bring at private sale, assesses them at what he regards as their value at a forced sale, it is held to be such a disregard of the statute as to render the assessment void and to authorize an injunction.<sup>65</sup> The failure, however, of the assessor to verify the assessment roll as required by law does not render void a tax based thereon, and relief in such case will accordingly be denied.<sup>66</sup>

§ 505. **Personal property tax not enjoined; mill property; payment; exceptions to rule.** As regards the question of equitable relief against a tax which is levied upon or sought to be collected out of personal property, the better con-

<sup>63</sup> *Hersey v. Supervisors of Bar-ron Co.*, 37 Wis., 75.

<sup>64</sup> *Schettler v. City of Fort How-ard*, 43 Wis., 48.

<sup>65</sup> *Goff v. Supervisors of Outa-gamie Co.*, 43 Wis., 55.

<sup>66</sup> *Fifield v. Marinette Co.*, 62

Wis., 532, 22 N. W., 705, in effect overruling *Marsh v. Supervisors of*

*Clark Co.*, 42 Wis., 502; *Wisconsin Central R. Co. v. Lincoln Co.*,

67 Wis., 478, 30 N. W., 619; fol-  
lowed by *Avant v. Flynn*, 2 S. Dak.,

153, 49 N. W., 15.

sidered doctrine and that supported by the clear weight of authority is, that equity will not interfere by injunction to restrain a levy upon or sale of personal property in satisfaction of a tax which is alleged to be illegal. Even in those states which have inclined to depart from the general doctrine denying relief in equity against an illegal tax, the courts, while contending for the jurisdiction in cases affecting the title to real estate, nevertheless refuse to interfere where only personal property is involved and leave the parties aggrieved to their remedy at law. The act of the officer making such levy being regarded as a mere trespass for which ample remedy may be had at law, a court of equity will decline to lend its aid by injunction for the prevention of such trespass.<sup>67</sup> And where the bill seeks to restrain a taxing officer from selling personal property for taxes, and complainants show the exact damage in dollars and cents which they would sustain by reason of the sale, an injunction will not be allowed,

<sup>67</sup> *Deane v. Todd*, 22 Mo., 90; 733; *Minneapolis, etc. Ry. Co. v. Lockwood v. St. Louis*, 24 Mo., 20; *Dickey County*, 11 N. Dak., 107, *Van Cott v. Supervisors*, 18 Wis., 90 N. W., 260; *Oregon etc. Ry. Co. v. Standing*, 10 Utah, 452, 37 Pac., 247; *Chicago & N. W. R. Co. v. Borough of Fort Howard*, 21 Wis., 687. And see *Thomas v. Gain*, 35 Mich., 155. An exception to the general rule of non-interference has been recognized where the property is of peculiar value to the owner or where a valuable franchise would be interfered with. *City of Detroit v. Wayne Circuit Judge*, 127 Mich., 604, — N. W., —. *Contra. Spencer v. Wheaton*, 14 Iowa, 38; *Valle v. Ziegler*, 84 Mo., 214; *Searing v. Heavysides*, 106 Ill., 85; *Phelan v. Smith*, 22 Wash., 397, 61 Pac., 31; *North Western Lumber Co. v. Chehalis County*, 24 Wash., 626, 64 Pac., 787; *Rothwell v. County of Knox*, 62 Neb., 50, 86 N. W., 903; *Young, 10 N. Dak.*, 215, 86 N. W., *Alexander v. Henderson*, 105 Tenn.

the proper remedy being at law.<sup>68</sup> So in cases of municipal taxes or assessments upon personal property, equity will not interfere by injunction merely because of the illegality of the tax, since the person aggrieved has an adequate remedy at law by an action for the trespass which would result from enforcing its collection.<sup>69</sup> And upon similar principles the owner of a mill which stands upon land belonging to another person is not entitled to an injunction to prevent a sale of the mill for taxes, upon the ground that it was wrongfully assessed with the land, since if it were thus improperly assessed with the land and not as the personal property of the owner, a court of law could afford ample relief for any injury which might result from a sale for such taxes.<sup>70</sup> Nor will equity enjoin the enforcement of a tax levied upon personal property because it is improperly or inaccurately described upon the tax rolls, when complainant is liable for the tax, and the property charged therewith has been in fact assessed, and the assessment is neither excessive nor the valuation too large.<sup>71</sup> The rule, however, is subject to some exceptions; and where the property which is about to be seized for non-payment of an alleged illegal tax consists of the rolling stock of a rail-

431, 58 S. W., 648. And in *Peck v. School District No. 4*, 21 Wis., 516, followed by *State v. Circuit Court*, 98 Wis., 143, 73 N. W., 788 and *Hoff v. Olson*, 101 Wis., 118, 76 N. W., 1121, 70 Am. St. Rep., 903, the doctrine is laid down that the objection that the remedy of the party aggrieved should be sought at law rather than in equity must be taken by demurrer or answer, and if not so taken the relief by injunction will be granted. The court, it is held, has power to hear and determine the action, and the objection that complainant has a remedy at law is not jurisdictional, and is no more than a rule of prac-

tice in the court of chancery. It may well be doubted whether this doctrine is consistent with the weight of the authorities cited in support of the principles laid down in the preceding sections, since the courts have almost uniformly treated the objection that the remedy was at law as jurisdictional, regardless of whether the question was so presented by the pleadings.

<sup>68</sup> *Conley v. Chedic*, 6 Nev., 222.

<sup>69</sup> *Mayor v. Baldwin*, 57 Ala., 61; *Baldwin v. Tucker*, 16 Fla., 258. And see, *post*, § 543.

<sup>70</sup> *Witherspoon v. Nickels*, 27 Ark., 332.

<sup>71</sup> *Harrison v. Vines*, 46 Tex., 15.



road or street railway company which is indispensable to the proper performance of its functions as a quasi-public corporation and is consequently exempt from sale for taxes, an injunction is properly granted to prevent the threatened seizure of such property, the relief being based upon the injury to the public and the consequent inadequacy of the legal remedy.<sup>72</sup> And it has been held proper to enjoin a sale of personal property upon which distraint has been made for the payment of taxes which have been fully paid and discharged previous to the levy.<sup>73</sup> And it is also held that where the plaintiff is in possession of personal property as assignee under an assignment for the benefit of creditors and has therefore presumably inventoried the property and is under obligation to account therefor, and, in consequence, would be greatly embarrassed in the execution of his trust by a seizure and sale of the property, such circumstances constitute sufficient ground for an injunction against the threatened sale of such personalty under illegal proceedings for the collection of a tax thereon.<sup>74</sup> So it is proper to grant a preliminary injunction against the sale of chattels for the payment of an alleged illegal tax until the determination of the question of its legality, where the value of the property seized is grossly in excess of the amount of the disputed tax.<sup>75</sup>

§ 506. **Tax upon capital stock and franchises of corporations.** Relief by injunction has sometimes been allowed against taxation imposed upon the capital stock of corporations. And where it is sought to enforce a tax against the capital stock of a foreign corporation which is not authorized by

<sup>72</sup> *Chicago & N. W. R. Co. v. Ry. Co. v. City of Asheville*, 69 Forest County, 95 Wis., 80, 70 N. Fed., 359.

W., 77, overruling *Chicago & N. W. R. Co. v. Borough of Ft. Howard*, 689.

21 Wis., 45; *City of Detroit v. Wayne Circuit Judge*, 127 Mich., 431, 23 Pac., 257.

604, — N. W., —; *Southern Ry. Co. v. City of Asheville*, 69 Fed., 704.

<sup>73</sup> *Lewis v. Spencer*, 7 West Va., 689.

<sup>74</sup> *Dawson v. Croisan*, 18 Ore., 431, 23 Pac., 257.

<sup>75</sup> *Ex parte Chamberlain*, 55 Fed., 704.

law, the aid of an injunction may be properly extended in behalf of the corporation.<sup>76</sup> So where under a mistake as to the place where the personal property of a railway company is to be taxed its capital stock is taxed in a wrong locality, an injunction is regarded as proper.<sup>77</sup> And where the entire capital stock of a corporation has been invested in tangible property which has been properly returned for taxation, a tax levied upon such capital stock is illegal and void and its attempted enforcement will be enjoined.<sup>78</sup> The relief, however, is granted only to the extent that the tangible assets returned for taxation represent the investment of the capital stock.<sup>79</sup> And where a statute provides that the stock of a building and loan association shall be assessed against the shareholders and the real estate against the association, the collection of a tax upon the shares charged against the association will be enjoined.<sup>80</sup> So, also, where it is provided by statute that so long as a corporation pays taxes upon all of its property, the individual shareholders shall not be required to list their shares for taxation, equity may properly interfere to prevent the collection of a tax levied upon such shares where the corporation has paid the taxes upon its corporate property.<sup>81</sup> A court of equity will not, however, lend its aid by injunction to restrain the collection of a tax upon the capital stock and franchise of a corporation which has been equalized and fixed by a state board of equalization, acting within the scope of their authority and under a valid law, when no fraud is shown and when the property taxed is legally liable to taxation, and the rule of uniformity has not been

<sup>76</sup> *Riley v. Western Union Telegraph Co.*, 47 Ind., 511.

<sup>77</sup> *Mohawk & H. R. Co. v. Clute*, 4 Paige, 384.

<sup>78</sup> *Hyland v. Brazil B. C. Co.*, 128 Ind., 335, 26 N. E., 672; *Lewiston W. & P. Co. v. Asotin County*, 24 Wash., 371, 64 Pac., 544.

<sup>79</sup> *Hyland v. C. I. & S. Co.*, 129 Ind., 68, 28 N. E., 308, 13 L. R. A., 515.

<sup>80</sup> *Olney L. & B. Association v. Parker*, 196 Ill., 388, 63 N. E., 725.

<sup>81</sup> *Louisville Trust Co. v. Stone*, 46 C. C. A., 299, 107 Fed., 305.

violated.<sup>82</sup> Nor does the fact that such board may have erred in judgment, in such case, thereby making the assessment at too high a rate, warrant relief by injunction when they have acted within the scope of their authority.<sup>83</sup> But when a board of equalization undertakes to fix valuations upon the capital stock and franchise of a corporation, for purposes of taxation, through prejudice or a reckless disregard of duty, and makes a grossly arbitrary and unreasonable valuation, equity may relieve by injunction. Thus, where such board in fixing the valuation of the capital stock and franchise of a railroad company has assessed it beyond its value, by adding to what they determine to be the value of the capital stock not only the indebtedness of the railway company proper, as required by law, but also the indebtedness of other railway companies of which it is lessee, one of which lies entirely beyond the state, and for the payment of none of whose taxes is the company liable, an injunction may be allowed.<sup>84</sup>

§ 507. **Taxation of national banks.** As regards the question of equitable relief by injunction against the taxation of the capital stock of national banks, incorporated under the national banking act of the United States, the federal courts have undoubted jurisdiction to entertain a bill to restrain the collection of an illegal tax levied by state authorities upon the capital stock of such banks.<sup>85</sup> The jurisdiction in this

<sup>82</sup> State Railroad Tax Cases, 2 Otto, 575; Porter v. Rockford, R. I. & St. L. R. Co., 76 Ill., 561; Ottawa Glass Co. v. McCaleb, 81 Ill., 556.

<sup>83</sup> Porter v. Rockford, R. I. & St. L. R. Co., 76 Ill., 561; Ottawa Glass Co. v. McCaleb, 81 Ill., 556. And see Pacific Hotel Co. v. Lieb, 83 Ill., 602.

<sup>84</sup> Chicago, B. & Q. R. Co. v. Cole, 75 Ill., 591.

<sup>85</sup> Pelton v. National Bank, 101 U. S., 143; Cummings v. National Bank, 101 U. S., 153; First National Bank v. County of Douglas, 3 Dill., 298; Third National Bank v. Mylin, 76 Fed., 385; First National Bank v. City of Covington, 103 Fed., 523. As to the right to enjoin a state tax in the federal courts, see Wells v. Central Vermont R. Co., 14 Blatch., 426.

class of cases is usually invoked upon the ground of a violation by the state authorities of the provisions of section 5219 of the Revised Statutes of the United States, which prohibits the taxation by any state of the shares of national banks "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." Under the provisions of this section, whenever the shares of national banks are, under the rule of assessment adopted by state assessors, taxed at a valuation largely in excess of all other classes of moneyed capital, thus violating the principle of uniformity of taxation fixed by the constitution of the state, equity may enjoin the enforcement of the excess of such taxes, upon payment of the amount justly due.<sup>86</sup> And when, under the laws of the state for the taxation of national bank shares, the owner of the shares is not allowed to deduct from their assessed value the amount of his *bona fide* indebtedness, as in cases of other investments of moneyed capital, such discrimination constitutes sufficient ground for enjoining the tax as to shareholders who have been denied such privilege.<sup>87</sup> In such cases, when the state law requires the national bank to report the names of its shareholders and the amount of their shares for taxation, authorizing the bank to pay the tax and to deduct the amount from any dividends due to the shareholders, and forbidding the bank to make payment of any dividends upon such shares or to permit their transfer, until the tax is paid, the bank itself may maintain a bill to enjoin such excessive taxation.<sup>88</sup> But

<sup>86</sup> Pelton v. National Bank, 101 U. S. 143; Cummings v. National Bank, 101 U. S., 153; First National Bank v. City of Covington, 103 Fed., 523. See also National Albany Exchange Bank v. Wells, 18 Blatch., 478; Albany City National Bank v. Maher, 19 Blatch., 175; First National Bank of Utica v. Waters, 19 Blatch., 242. For the

statutory provision in question see 3 U. S. Comp. Stat. 1901, p. 3502.

<sup>87</sup> Hills v. Exchange Bank, 105 U. S., 319; Evansville Bank v. Britton, 105 U. S., 322, affirming S. C., 10 Biss., 503, 8 Fed., 867.

<sup>88</sup> Pelton v. National Bank, 101 U. S., 143; Cummings v. National Bank, 101 U. S., 153; Evansville Bank v. Britton, 105 U. S., 322,

the relief will be refused when the bank fails to pay or tender the amount of the tax which is lawfully due.<sup>89</sup> And an injunction will not be granted because of mere inequalities in valuation, when it does not appear that any statutory discrimination has been made against complainants, or that their shares are rated by the assessing officers higher in proportion to their actual value than other moneyed capital.<sup>90</sup> Nor will the relief be granted unless it is shown that the shares are valued higher than other moneyed capital generally, and it is not sufficient to allege that such is the fact in particular instances.<sup>91</sup> And such shares of stock being properly taxable by the states, the federal courts will not enjoin the collection of a tax imposed thereon by a state, when it is not shown that the valuation of the shares is excessive, even though the officers making the assessment may have arrived at a correct result by an erroneous method.<sup>92</sup> Nor will mere irregularities in the assessment of the tax and defects in the construction of the law under which it is levied afford ground for enjoining the enforcement of a tax assessed upon the shareholders of a national bank.<sup>93</sup> But, although the property of a national bank and its capital stock may be taxed by state authority, its right to do business can not be so taxed, and a court of equity may, therefore, enjoin a tax which it is sought to levy by a city government upon the business of such a bank.<sup>94</sup> And where the tax upon shares in national banks exceeds the rate of taxation imposed upon banks of the state, its collection may be enjoined, but only upon pay-

affirming S. C., 10 Biss., 503, 8 Fed., 867; *Hills v. Exchange Bank*, 105 U. S., 319. See, *contra*, *First National Bank v. Meredith*, 44 Mo., 500; *Frazer v. Slebern*, 16 Ohio St., 614.

<sup>89</sup> *National Bank v. Kimball*, 103 U. S., 732.

<sup>90</sup> *Wagoner v. Loomis*, 37 Ohio St., 571.

<sup>91</sup> *First National Bank v. Farwell*, 10 Biss., 270.

<sup>92</sup> *St. Louis National Bank v. Papin*, 4 Dill., 29.

<sup>93</sup> *Burke v. Speer*, 59 Ga., 353.

<sup>94</sup> *Mayor v. First National Bank of Macon*, 59 Ga., 648.



ment of a sum which shall be a fair equivalent for the tax on the banks of the state.<sup>95</sup> And where an illegal tax is levied against the shareholders of a national bank but is made payable by the bank, the latter, in order to prevent a multiplicity of suits may enjoin the extension of the tax; and in such case, it is not necessary that the bank should allege that it has dividends on hand belonging to the shareholders out of which it would be required to pay the tax if extended and enforced.<sup>96</sup>

§ 508. **Internal revenue taxes.** The circuit courts of the United States will interfere to restrain a collector of internal revenue from the collection of a tax improperly assessed.<sup>97</sup> And it has been held that the courts of a state may also interfere to restrain revenue officers of the United States from collecting a revenue tax unauthorized by law.<sup>98</sup> So if after payment of the full legal tax upon a manufactured article, the collector threatens to levy upon the property for an additional sum in excess of the legal tax justly due, he may be enjoined from such illegal action.<sup>99</sup> But a bill to enjoin the enforcement of a tax under the revenue laws, in the nature of a bill of peace, will not lie in favor of a number of persons joined as complainants whose only interest in common is in resisting the tax, they having no common interest in the subject-matter on which it is levied.<sup>1</sup> And where many persons are affected by the tax and the remedy by suit in equity will involve vexatious litigation, the court will not grant the injunction.<sup>2</sup>

<sup>95</sup> *Frazer v. Slebern*, 16 Ohio St., 614.

<sup>96</sup> *Knopf v. First National Bank*, 173 Ill., 331, 50 N. E., 660.

<sup>97</sup> *Georgia v. Atkins*, 1 Abb. U. S. R., 22. And this doctrine would seem to be sustained by the reasoning of the court in *Cutting v. Gilbert*, 5 Blatch., 259, although the injunction was refused in that case

because of improper joinder of parties. But see *Powell v. Redfield*, 4 Blatch., 45.

<sup>98</sup> *Georgia v. Atkins*, 35 Ga., 315.

<sup>99</sup> *Fryser v. Russell*, 3 Hughes, 227.

<sup>1</sup> *Cutting v. Gilbert*, 5 Blatch., 259.

<sup>2</sup> *Id.*

§ 509. **Levy on property for tax of another.** Upon the question of granting injunctive relief against a levy upon the property of one person for the tax of another, the authorities are not altogether harmonious. The better considered doctrine, which is based upon the fundamental principle denying relief by injunction against the enforcement of taxes when an adequate remedy exists at law, is that the levy of a warrant against the property of complainant for unpaid taxes assessed against a third person will not ordinarily be enjoined; since in such case the officer levying the warrant would be guilty of a trespass, the warrant giving him no authority to take property other than that of the person assessed, and the remedy at law for such a trespass would be ample.<sup>3</sup> Where, however, a tax collector levies upon the property of one person to satisfy a tax against another, a court of equity may properly grant an injunction upon a bill alleging the insolvency of the collector, the relief being allowed under such circumstances because of the inadequacy of the remedy at law.<sup>4</sup> And where it is sought to levy upon complainant's real property for the tax of another, the relief will be granted.<sup>5</sup>

§ 510. **Effect of legislation curing defects.** A court of equity will not interfere by injunction with tax proceedings which, though originally defective, have been subsequently cured by an act of legislature.<sup>6</sup> And although the assessment of a tax has once been enjoined by a court of competent jurisdiction, upon the ground of its being unauthorized by law, it is still competent for the legislative authority to cure the defect in the law, and to authorize a re-assessment of the tax. And while in such case the injunction against the former pro-

<sup>3</sup> M. R., F. S. & Gulf R. Co. v. r. Widmayer, 196 Ill., 623, 63 N. E., Wheaton, 7 Kan., 232; White v. 1078.

Steuder, 24 West Va., 615. *Contra*.

<sup>4</sup> Deming v. James, 72 Ill., 78.

Rothwell v. County of Knox, 62

<sup>5</sup> Weyse v. Crawford, 85 Cal.,

Neb., 50, 86 N. W., 903; Irvin v.

196, 24 Pac., 735.

Railroad Co., 94 Ill., 105; Searing

<sup>6</sup> Cogwill v. Long, 15 Ill., 202.

v. Heavysides, 106 Ill., 85; Condit

ceedings remains a perpetual bar to the enforcement of that assessment, it does not operate upon the new proceedings taken under legislative authority for the purpose of a re-assessment, and such new proceedings are in no sense a re-opening of the former judgment granting the injunction, that judgment being only effective against the former proceedings.<sup>7</sup> So when an injunction has been granted against the collection of a tax because of a defect in the assessment, which defect is remedied by a subsequent legislative enactment, and a new assessment is then made under new legislative authority, the former injunction does not operate as *res judicata* to prevent such re-assessment and re-levy of the tax.<sup>8</sup>

§ 511. **Preliminary proceedings; extending tax on books.** The proceedings preliminary to the actual levy of a tax will not be enjoined, whether it is about to be imposed upon personalty or realty, since the person at whose instance the suit is brought can not from the nature of the case obtain redress until the amount of his own tax has been ascertained by actual levy.<sup>9</sup> Nor will a county clerk be enjoined from extending a tax upon the collector's books, unless it is entirely unauthorized and void *in toto*; and if any portion of the tax is valid the court will not interpose until it is extended upon the collector's books.<sup>10</sup>

§ 512. **Payment of taxes; set-off.** The fact that the taxes in question have actually been paid affords sufficient ground for enjoining a sale of real estate in satisfaction of such taxes.<sup>11</sup> But a court of equity will not enjoin a county treasurer from applying for judgment for delinquent taxes against complainant's lands upon the ground that the taxes have already been paid, when such payment can be interposed as a defense to the application for judgment, the remedy at law

<sup>7</sup> *Mills v. Charleton*, 29 Wis., 400.  
And see *Dean v. Borchsenius*, 39 Wis., 237.

<sup>8</sup> *City of Emporia v. Bates*, 16 Kan., 495.

<sup>9</sup> *Miller v. Grandy*, 13 Mich., 540.  
<sup>10</sup> *Ottawa Glass Co. v. McCaleb*, 81 Ill., 556.

<sup>11</sup> *City of Logansport v. Carroll*, 95 Ind., 156.

being ample in such case.<sup>12</sup> Nor will a tax be enjoined because complainant has paid previous assessments which were illegal, and which he now seeks to have set off against the tax in question.<sup>13</sup> But a property owner who has paid all taxes assessed against him for the years in question, may enjoin additional taxes imposed for the same period without lawful authority.<sup>14</sup>

§ 513. **Refusal of collector to receive amount fixed by arbitration.** Where a bill in equity was pending against a tax collector to enjoin certain taxes against a private corporation, and pending that proceeding an act of legislature was passed appointing a designated officer to determine what amount of taxes the corporation was justly liable to pay, and to certify such amount to the tax collector who should receive it in full satisfaction, upon compliance with the act and upon complainant tendering the amount fixed by the arbitrator, which the tax collector refused to receive, it was held a proper case for an injunction in behalf of the corporation to restrain the collector from collecting the tax.<sup>15</sup>

§ 514. **Recoupment of taxes not allowed.** A county treasurer who has paid over to the state treasurer certain money derived from taxes illegally assessed and collected, the money having passed beyond his control and into the hands of the state treasurer, will not be enjoined from paying over to the latter out of legal taxes subsequently received by him a sum equal to the illegal taxes before collected; since the granting of the relief in such case would, in effect, be a recognition of the doctrine of set-off or recoupment as against a sovereign state.<sup>16</sup>

§ 515. **Refusal of injunction confers no authority; decree void as to subsequent taxes.** The refusal of an injunction

<sup>12</sup> *Dunham v. Miller*, 75 Ill., 379.

<sup>13</sup> *Fremont v. Early*, 11 Cal., 361.

<sup>14</sup> *Scott v. Knightstown*, 84 Ind., 108. And see *Hamilton v. Amsden*, 88 Ind., 304.

<sup>15</sup> *Tallassee Manufacturing Co. v. Glenn*, 50 Ala., 489.

<sup>16</sup> *Shoemaker v. Board of Commissioners of Grant Co.*, 36 Ind., 175.

which is sought against the collection of taxes does not confer upon the officers any right or power to collect the tax, but merely leaves them possessed of such rights in that behalf as they had before the refusal.<sup>17</sup> But where a bill against a county treasurer to enjoin taxes prays relief only against the taxes of a particular year, and the decree enjoins the defendant and his successors in office forever from attempting to collect any subsequent tax upon the property in question, such decree will be held void and inoperative as to the subsequent taxes and will be set aside as to them.<sup>18</sup>

§ 516. **Unincorporated company; illegal contracts for improvements.** It is held in Indiana, when taxes are about to be levied to be paid to a turnpike company for the construction of a road, but the company is not properly incorporated and is without authority to act and the tax is illegal, that its collection may be enjoined.<sup>19</sup> So where the directors of a company organized for the improvement of highways under the laws of the state have made contracts for such improvements with their own members, such contracts being illegal, taxpayers are entitled to an injunction to prevent the collection of taxes levied for the payment of such improvements.<sup>20</sup>

§ 517. **When personal property to be first taken.** Where under the laws of the state lands of the taxpayer can not be sold for the enforcement of a tax while he has personal property subject to taxation sufficient to pay the tax, it is held that a sale of his lands for the unpaid tax, when he has sufficient personal property out of which it might be satisfied, may be enjoined.<sup>21</sup>

<sup>17</sup> Commissioners of Johnson Co. v. Ogg, 13 Kan., 198.

<sup>18</sup> Beach v. Shoenmaker, 18 Kan., 147.

<sup>19</sup> Knight v. Flatrock & Waldron Turnpike Co., 45 Ind., 134.

<sup>20</sup> Port v. Russell, 36 Ind., 60.

<sup>21</sup> Abbott v. Edgerton, 53 Ind., 196; Johnson v. Hahn, 4 Neb., 139, overruling Hallenbeck v. Hahn, 2 Neb., 377; City of Logansport v. Carroll, 95 Ind., 156. See also McPike v. Pen, 51 Mo., 63.



§ 518. **When cause of action partly good.** When a bill is filed to enjoin a tax and a general demurrer is interposed to the entire bill upon the ground that it states no cause of action, the demurrer should not be sustained if the bill states a good cause of action as to a part of the tax in question.<sup>22</sup> But a tax should not be enjoined as an entirety upon the ground that too much has been assessed.<sup>23</sup>

§ 519. **Injunction refused pending mandamus to allow appeal; insufficient bond on appeal.** When a taxpayer seeks an appeal from a judgment for the sale of his lands for delinquent taxes, but the appeal is refused because of his failure to deposit the amount of the judgment as required by statute, whereupon he files his petition in the Supreme Court of the state for a *mandamus* to compel the inferior court to allow the appeal, he will not, pending the proceedings in *mandamus*, be allowed an injunction to prevent the sale of his lands for the unpaid taxes.<sup>24</sup> Where, however, the injunction has been properly granted in other respects, it will not be reversed because the bond was for a sum much less than the amount of the tax and costs, when the defendant who is enjoined is not injured by reason of such deficiency.<sup>25</sup>

§ 520. **Franchises.** A court of equity will not, ordinarily, interfere by injunction with the collection of a tax upon a franchise because it has been illegally imposed, the proper remedy being at law.<sup>26</sup> Nor will the collection of an assessment for paving and improving streets be enjoined on the ground that such paving is an interference with the rights and franchises of a plank-road company having the right to use the streets, the injunction being sought, not by the company, but by an adjacent lot owner.<sup>27</sup>

<sup>22</sup> Dean v. Borchsenius, 30 Wis., 237.

<sup>23</sup> Indianapolis v. Gilmore, 30 Ind., 414.

<sup>24</sup> Andrews v. Rumsey, 75 Ill., 598.

<sup>25</sup> Drake v. Phillips, 40 Ill., 388.

<sup>26</sup> De Witt v. Hays, 2 Cal., 463.

<sup>27</sup> Bagg v. Detroit, 5 Mich., 336. And in Maryland it is held that unless the owners of a majority of the feet fronting on a street to be

§ 521. **Depreciation of property no ground for injunction.** Great depreciation in the value of a particular property, as a watering place, resulting from the condition of the country during a civil war, affords no ground for relief in equity against a tax assessed against such property upon its valuation before the war. While such considerations may be properly addressed to the legislative branch of the government, they can have no weight with the judicial, and equity will not assume jurisdiction to adjust the inequalities and misfortunes produced by civil war.<sup>28</sup>

§ 522. **When sale of personal property enjoined.** Where the jurisdiction of equity has attached for the purpose of annulling a tax certificate improperly issued and void, the court may properly proceed to enjoin a sale of personal property to satisfy the tax, the relief being allowed upon the familiar principle that, its jurisdiction having once attached, the court should give all the relief to which the party may be entitled, although some portion of it might otherwise have been recoverable in an action at law.<sup>29</sup>

§ 523. **Homestead entry.** One who has entered land under the act of Congress known as the homestead law, and who has improved the same and resided thereon, can not enjoin a tax which was levied upon the premises before he obtained his patent from the United States; since he can not be heard to allege his own failure to perfect his title as a ground upon which to base his claim for relief.<sup>30</sup>

§ 523 *a*. **Taxation of railway property.** A railway company may enjoin the sale of its property in satisfaction of taxes

paved assent in writing to the paving, the proceedings of the city authorities are void, and equity has jurisdiction on the application of such owners as have not assented to restrain the sale of property for such paving. *Holland v. May-*

*or*, 11 Md., 186; *Bouldin v. Mayor*, 15 Md., 18.

<sup>28</sup> *White Sulphur Springs Co. v. Robinson*, 3 West Va., 542.

<sup>29</sup> *Hamilton v. Fond du Lac*, 25 Wis., 490. See also *Peck v. School District No. 4*, 21 Wis., 517.

<sup>30</sup> *Bellinger v. White*, 5 Neb., 399.

which are unconstitutional and in violation of its chartered rights, especially when the questions involved as to the different constituent parts of the railway, and the liability of each, are so complicated that relief may better be had in equity than at law.<sup>31</sup> And when it is sought to collect from a railway company a tax upon property in which it has no title or ownership and which it uses for a fixed compensation paid to another company, the owner of such property, relief may be had by injunction.<sup>32</sup> So a railway company may enjoin the collection of taxes by distraint upon its rolling stock, machinery and other property, when it has tendered in payment coupons of state bonds which, by the laws of the state, are receivable in payment of taxes, the relief being granted for the prevention of irreparable injury and because of the inadequacy of the remedy at law.<sup>33</sup> But the collection of a tax against a railway company can not be enjoined by a foreign company, unless the latter will be injuriously affected as to its own property by the collection of such tax, even though it is in possession of and operating the line of the domestic company under an operating contract.<sup>34</sup>

§ 523 *b*. **Property assessed in one place but taxable at another.** Where property has been assessed for taxation in one place, but, by reason either of the domicile of its owner, or of the location of the property itself or of statutory enactment, it is properly taxable in another jurisdiction and has there been listed for taxation, a levy based upon such unauthorized assessment is illegal and void and its enforcement will be enjoined. Thus, where property is taxable in one county and has there been assessed and the tax paid, relief will be allowed against the enforcement of a tax levied by

<sup>31</sup> *Wright v. Southwestern R. Co.*, 64 Ga., 783.

<sup>32</sup> *Irvin v. New Orleans, St. L. & C. R. Co.*, 94 Ill., 105.

<sup>33</sup> *Allen v. Baltimore & O. R. Co.*, 114 U. S., 311.

<sup>34</sup> *Archer v. Terre Haute & I. R. Co.*, 102 Ill., 493.

another county.<sup>35</sup> So where the plaintiff had money on deposit in a bank in a state other than that of his domicile, which was taxable as a *chose in action* at his domicile, an injunction was granted to restrain the collection of a tax levied upon such deposit by the authorities of the state where the bank is situated.<sup>36</sup> So where the subject-matter of the tax is beyond the territorial jurisdiction of the taxing authorities, the relief will be granted.<sup>37</sup> And where a statute gives a corporation the option of returning its property for taxation either in the county where located or in the county where its principal place of business is situated and the corporation had returned for taxation in the county of its place of business and had paid the taxes on certain property located in another county, an injunction will lie to restrain the collection of a tax levied upon such property by the county of its location.<sup>38</sup> So a tax levied by the authorities of a town against one who is a non-resident thereof will be restrained.<sup>39</sup>

<sup>35</sup> *Court v. O'Connor*, 65 Tex., Nebraska City, 53 Neb., 453, 73 N. W., 952; *Vogt v. Ayer*, 104 Ill., 583. 334.

<sup>36</sup> *Pyle v. Brenneman*, 60 C. C. A., 409, 122 Fed., 787. <sup>38</sup> *Penick v. High S. Mfg. Co.*, 113 Ga., 592, 38 S. E., 973.

<sup>37</sup> *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb., 369, 70 N. W., 955; *Chicago, B. & Q. R. Co. v. Crim v. Town of Philippi*, 38 West Va., 122, 18 S. E., 466.

## II. CLOUD UPON TITLE.

- § 524. Injunction granted to prevent cloud upon title.  
 525. Defects must be *dehors* the record.  
 526. Illustrations of the doctrine.  
 527. Fraudulent conduct of officers or boards.  
 528. The same.  
 529. Sale of realty enjoined when tax should be satisfied out of personality.

§ 524. Injunction granted to prevent cloud upon title. The most generally recognized exception to the rule that equity will not interfere with the collection of the revenue because of defects or illegalities in the proceedings, is in cases where the proceedings if not enjoined would result in clouding the title to real estate. Thus, where the defect is not merely a formal one but works a substantial injury to complainant's rights, resulting in a cloud upon his title, the injunction will be granted.<sup>1</sup> And where the proceedings sought to be set aside

<sup>1</sup> Mitchell *v.* Milwaukee, 18 Wis., 92; Crane *v.* Janesville, 20 Wis., 305; Siegel *v.* Supervisors, 26 Wis., 70; Milwaukee Iron Co. *v.* Town of Hubbard, 29 Wis., 51; Johnson *v.* City of Milwaukee, 40 Wis., 315; Beaser *v.* City of Ashland, 89 Wis., 28, 61 N. W., 77; Dietz *v.* City of Neenah, 91 Wis., 422, 64 N. W., 299, 65 N. W., 500; Heywood *v.* Buffalo, 14 N. Y., 534; Mutual B. L. Ins. Co. *v.* Supervisors, 33 Barb., 322; Morris C. & B. Co. *v.* Jersey City, 1 Beas., 227; Marquette, H. & O. R. Co. *v.* Marquette, 35 Mich., 504; Folkerts *v.* Power, 42 Mich., 283, 3 N. W., 857; Huntington *v.* Central P. R. Co., 2 Sawy., 503; Tilton *v.* Oregon C. M. R. Co., 3 Sawy., 22; Johnson *v.* Hahn, 4 Neb., 139, overruling Hallenbeck *v.* Hahn, 2 Neb., 377; South Platte Land Co. *v.* Buffalo Co., 7 Neb., 253; Touzalin *v.* City of Omaha, 25 Neb., 817, 41 N. W., 796; Wiley *v.* Flournoy, 30 Ark., 609; Greedup *v.* Franklin Co., 30 Ark., 101; Hare *v.* Carnall, 39 Ark., 196; Mobile & Girard R. Co. *v.* Peebles, 47 Ala., 317; Fowler *v.* City of St. Joseph, 37 Mo., 228; Leslie *v.* St. Louis, 47 Mo., 474; McPike *v.* Pen, 51 Mo., 63; Goring *v.* McTaggart, 9 Ind., 200; Bramwell *v.* Guheen, 3 Idaho, 347, 29 Pac., 110; Benn *v.* Chehalis County, 11 Wash., 134, 39 Pac., 365; Tygart's Valley Bank *v.* Town of Philippi, 38 West Va., 219, 18 S. E., 489; Gregg *v.* Sanford, 12 C. C. A., 525, 65 Fed., 151; Taylor *v.* L. & N. R. Co., 31 C. C. A., 537, 88 Fed., 350; California



are valid upon their face and extrinsic facts are necessary to be proven to show their invalidity or illegality, equity will interfere to prevent a cloud upon title.<sup>2</sup> So where two lots have been assessed together as the property of a person owning but one of them and a gross tax has been imposed upon the two, the case is regarded as falling within the exception, and the injunction may be allowed.<sup>3</sup> So, too, where a city charter declares a tax a lien upon the premises on which it is assessed, the tax, if illegal, creates such a cloud upon the title as to warrant an injunction. Nor, in such case, does the fact that there was sufficient personal property out of which the tax might have been collected vary the question or avail against the injunction.<sup>4</sup> And the jurisdiction thus to interfere for the prevention of a cloud upon title is regarded as pertaining to the well settled powers of equity, which will interfere to prevent such a cloud as tends to diminish the value of the property or cast a doubt upon the title.<sup>5</sup> Thus, the sale of real estate for the collection of an unpaid assessment under a void precept may be restrained for the prevention of a cloud upon the title.<sup>6</sup> So the owner of real estate may enjoin the issuing of a tax deed to defendant, who claims to have purchased plaintiff's lot at a tax sale, when in fact the purchase did not cover the lot in question.<sup>7</sup>

& O. Land Co. *v.* Gowen, 48 Fed., 261; S. C., 57 Barb., 383; Tilton *v.* 771; Southern Ry. Co. *v.* City of Oregon C. M. R. Co., 3 Sawy., 22; Asheville, 69 Fed., 359; Lytle *v.* Gregg *v.* Sanford, 12 C. C. A., 525, Black, 107 Ga., 384, 33 S. E., 414; 65 Fed., 151.

Vesta Mills *v.* City Council, 60 S. C., 1, 38 S. E., 226. And see Powell *v.* Parkersburg, 28 West Va., 698.

As to the right of a mortgagee to such relief after judgment of foreclosure, see Horn *v.* Garry, 49 Wis., 464, 5 N. W., 897.

<sup>3</sup> Crane *v.* Janesville, 20 Wis., 305.

<sup>4</sup> Scofield *v.* Lansing, 17 Mich., 437.

<sup>5</sup> Dean *v.* Madison, 9 Wis., 402; Touzalin *v.* City of Omaha, 25 Neb., 817, 41 N. W., 796.

<sup>6</sup> Goring *v.* McTaggart, 92 Ind., 200.

<sup>7</sup> Koon *v.* Snodgrass, 18 West Va., 320.

<sup>2</sup> Dean *v.* Madison, 9 Wis., 402; Heywood *v.* Buffalo, 14 N. Y., 534; Minnesota L. O. Co. *v.* Palmer, 20 Minn., 468; Hanlon *v.* Supervisors of Westchester, 8 Ab. Pr. N. S.,

§ 525. **Defects must be dehors the record.** It is to be observed, however, that where the relief is sought to prevent a cloud upon title it will only be granted in those cases where the illegality or irregularity complained of exists *deshors* the record. And where the objection to the validity of the tax or assessment appears upon the face of the tax proceedings, or upon the face of the proceedings by which alone the adverse party can claim title to the land sold for the unpaid tax, equity will not enjoin.<sup>8</sup> Thus, where the assessment proceedings are void upon their face, so that a purchaser at a tax sale under those proceedings would not obtain a *prima facie* title, the remedy at law is perfect and an injunction will be refused.<sup>9</sup> And where a tax deed, if issued, would not be *prima facie* evidence of title, and consequently would not cast a cloud upon complainant's title, relief by injunction will be denied.<sup>10</sup> But where by statute a tax deed is made *prima facie* evidence of the regularity of all the proceedings incident to the assessment and sale, if the tax has been imposed contrary to law, such a cloud upon the title will result as to warrant the interference of equity.<sup>11</sup> Thus, where, contrary to a city charter, lots belonging to different owners have been assessed together, instead of separately, and for the improvement of streets not adjacent to the lots, the sale may be enjoined, the defects not appearing on the face of the deed which is, by statute, *prima facie* evidence of title.<sup>12</sup> Mere vagueness, however, or inaccuracy in the de-

<sup>8</sup> *Van Rensselaer v. Kidd*, 4 Barb., 17; *Bouton v. Brooklyn*, 15 Barb., 393; *Harkness v. Board of Public Works*, 1 McArthur, 121; *Robinson v. Gaar*, 6 Cal., 273; *Bucknall v. Story*, 36 Cal., 67; *Byrne v. Drain*, 127 Cal., 663, 60 Pac., 433; *Van Doren v. Mayor*, 9 Paige, 388; *Dean v. Madison*, 9 Wis., 402. And see *Wiggin v. New York*, 9 Paige, 17; *Curtis v. East Saginaw*, 35 Mich., 508.

<sup>9</sup> *Van Doren v. Mayor*, 9 Paige, 388.

<sup>10</sup> *Minturn v. Smith*, 3 Sawy., 142.

<sup>11</sup> *Palmer v. Rich*, 12 Mich., 414; *Jenkins v. Rock Co.*, 15 Wis., 11; *Bramwell v. Guheen*, 3 Idaho, 347, 29 Pac., 110.

<sup>12</sup> *Jenkins v. Rock Co.*, 15 Wis., 11.

scription of land to be sold for taxes is not sufficient to warrant an injunction against the sale on the ground of preventing a cloud upon title, since if the tax is justly due the cloud may easily be avoided by payment.<sup>13</sup> And where the description in a tax deed is so defective as to render the deed utterly void, a court of equity will not interfere.<sup>14</sup>

§ 526. **Illustrations of the doctrine.** In conformity with the general doctrine as already stated, it is held that where the record of the tax proceedings is *prima facie* valid, and extrinsic evidence is necessary to show its invalidity, so that there is no full and adequate remedy at law to correct an abuse of the taxing power, equity may properly interfere by injunction.<sup>15</sup> So where the invalidity of a tax sale is not apparent upon the conveyance, and the proofs of such invalidity are likely to be lost by time, proceedings under the tax sale may be enjoined for the prevention of a cloud upon the owner's title.<sup>16</sup> And when an invalid assessment has been made upon adjacent lot owners in a city for the improvement of a river, equity may enjoin the municipal authorities from executing to the contractor who has performed the work a certificate for the assessment, since such a certificate would be an apparent charge or incumbrance upon the property which would constitute a cloud upon the title.<sup>17</sup> So when proceedings taken by a municipal corporation to enforce payment of an assessment for street improvements by a sale of property are void, an injunction against the sale may be granted for the purpose of preventing a cloud upon the title.<sup>18</sup> So an injunction preventing a cloud upon title will be granted to

<sup>13</sup> Burlington & M. R. R. Co. v. Spearman, 12 Iowa, 112.

<sup>14</sup> Head v. James, 13 Wis., 641.

<sup>15</sup> Greedup v. Franklin Co., 30 Ark., 101. And it is held in the same case that the prevention of a multiplicity of suits at law affords

additional ground for relief by injunction in such a case.

<sup>16</sup> Mobile & Girard R. Co. v. Peebles, 47 Ala., 317.

<sup>17</sup> Johnson v. City of Milwaukee, 40 Wis., 315.

<sup>18</sup> Fowler v. City of St. Joseph, 37 Mo., 228.

restrain the enforcement of a tax levied under an act providing for the taxation of the capital stock of corporations, upon the ground that the plaintiff is a joint stock company and not a corporation, since extrinsic evidence would be necessary to show that plaintiff does not come within the provisions of the act.<sup>19</sup>

§ 527. **Fraudulent conduct of officers or boards.** Upon like principles the courts have interposed by injunction against the enforcement of taxes dependent upon the fraudulent and arbitrary action of boards of public officers, intrusted by law with the duty of equalizing the valuations of property for purposes of taxation.<sup>20</sup> Thus, where a change was made in the valuation of complainant's property after the adjournment of such a board, and without authority of law, thereby largely increasing such valuation, an injunction was allowed to prevent the extending of the taxes upon the tax books, since the illegality of the assessment in such case would not necessarily appear upon the face of a tax deed, and the deed would therefore constitute a cloud upon the title to complainant's lands.<sup>21</sup> So when the proceedings of a board of equalization in increasing the assessment of complainant's lands, without authority of law and without notice or opportunity to be heard, are regular upon their face, and require extrinsic evidence to establish their invalidity, relief by injunction is proper for the prevention of a cloud upon title.<sup>22</sup>

§ 528. **The same.** The jurisdiction in this class of cases may also be exercised in connection with such circumstances of fraud as entitle complainant to equitable relief, and for the double purpose of relief against fraud and of preventing a cloud upon title. And when the authorities of a town in levying a tax have omitted to assess lands to the owners or

<sup>19</sup> Gregg v. Sanford, 12 C. C. A., 525, 65 Fed., 151.

<sup>21</sup> Wiley v. Flournoy, 30 Ark., 609.

<sup>20</sup> Wiley v. Flournoy, 30 Ark., 609; South Platte Land Co. v. Buffalo Co., 7 Neb., 253.

<sup>22</sup> South Platte Land Co. v. Buffalo Co., 7 Neb., 253.

occupants when known, and have intentionally made gross and excessive valuations, and have arbitrarily increased the valuation without proof, for the purpose of compelling the owners to pay more than their just proportion of the taxes, relief by injunction may be granted, both on account of the fraud shown and to prevent a cloud upon complainant's title.<sup>23</sup> And under such circumstances it is proper to interfere while the warrant and tax roll are still in the hands of the town officers and before the lands are sold for taxes, since the tax is a lien upon the property from the time of its assessment; and the illegalities complained of not appearing upon the record of the tax proceedings, but existing *dehors*, the proceedings are regarded as constituting a cloud upon title of the most serious character and demanding the immediate interposition of a court of equity.<sup>24</sup>

§ 529. **Sale of realty enjoined when tax should be satisfied out of personalty.** A court of equity may also enjoin a sale of lands by a sheriff in satisfaction of a tax, for the prevention of a cloud upon the title, when the sheriff is authorized by law to levy only upon goods and chattels and not upon real estate.<sup>25</sup> And upon a statute requiring personalty to be first proceeded against in the enforcement of taxes before realty can be taken, a sale of complainant's real estate in satisfaction of unpaid taxes may be restrained when he has personal property out of which the tax may be satisfied, the foundation of relief in such case being the necessity of preventing a sale whose only result would be to cast a cloud upon complainant's title.<sup>26</sup> So the execution of a tax deed may be enjoined where the sale of the premises was void because plaintiff had sufficient personal property out of which the taxes in question might have been satisfied.<sup>27</sup>

<sup>23</sup> Milwaukee Iron Co. v. Town of Hubbard, 29 Wis., 51. See <sup>26</sup> Johnson v. Hahn, 4 Neb., 139, overruling Hallenbeck v. Hahn, 2 Neb., 377. And see Abbott v. Ed-

<sup>24</sup> Milwaukee Iron Co. v. Town of Hubbard, 29 Wis., 51. gerton, 53 Ind., 196.

<sup>25</sup> McPike v. Pen, 51 Mo., 63. <sup>27</sup> Morrison v. Bank of Commerce, 81 Ind., 335.



## III. PROPERTY EXEMPT FROM TAXATION.

- § 530. Injunction granted when property exempt.  
 531. The doctrine applied to railway property.  
 532. Lands exempted by United States.  
 533. Remission of tax by legislature.  
 534. Transfer of taxing power; omission to tax railway property.  
 535. Entire tax not enjoined because part exempt; property in receiver's hands.

§ 530. **Injunction granted when property exempt.** An important exception to the general doctrine of non-interference by injunction against the collection of the revenue because of illegality in the tax is recognized in that class of cases where the relief is sought against a tax assessed upon property which has been exempted by law from taxation. Indeed, the exception has been so uniformly recognized as to become of itself a governing rule in the class of cases now under consideration. And it may be laid down as the established doctrine of the courts that the attempted enforcement of a tax upon property which has been exempted by proper legislative authority from the burdens of taxation, constitutes a grievance of so irreparable a nature as to merit preventive relief by injunction.<sup>1</sup> And where an act of legislature, held by the court to

<sup>1</sup> *Illinois Central R. Co. v. County of McLean*, 17 Ill., 291; *Illinois Central R. Co. v. Hodges*, 113 Ill., 323; *Morris Canal & Banking Co. v. Jersey City*, 1 Beas., 227; *Oliver v. Memphis & Little Rock R. Co.*, 30 Ark., 128; *Marquette, H. & O. R. Co. v. Marquette*, 35 Mich., 504; *Mobile & Girard R. Co. v. Peebles*, 47 Ala., 317; *Mobile & O. R. Co. v. Moseley*, 52 Miss., 127; *Missouri River, F. S. & G. R. Co. v. Morris*, 13 Kan., 302; *Railway Co. v. McShane*, 22 Wal., 444, affirming S. C., 3 Dill., 303, and overruling in part *Railway Co. v. Prescott*, 16 Wal., 603; *Gonzales v. Sullivan*, 16 Fla., 791; *County of Anderson v. Kennedy*, 58 Tex., 616; *International & G. N. R. Co. v. Smith County*, 65 Tex., 21; *Davis v. Burnett*, 77 Tex., 3, 13 S. W., 613; *Mechanics Bank v. City of Kansas*, 73 Mo., 555; *North St. Louis Gymnastic Society v. Hudson*, 85 Mo., 32; *Philadelphia, W. & B. R. Co. v. Neary*, 5 Del. Ch., 600; *St. Mary's Gas Co. v. Elk County*, 168 Pa. St., 401, 31 Atl., 1077; *Vesta Mills v. City Council*, 60 S. C., 1, 38 S. E., 226; *City of Staunton v. Mary Baldwin Seminary*, 99 Va., 653, 39

be constitutional, exempts certain property from taxation, an injunction will be allowed against the enforcement of a tax upon such property.<sup>2</sup> So an injunction may be granted against the assessment of the property of a corporation where, under the terms of its charter as construed by the court of last resort of the state, the property is exempt from taxation.<sup>3</sup> But an exemption from taxation does not relieve the property of the burden of special assessments and equity will therefore not interfere with such assessments upon the ground that the property is exempt from taxation.<sup>4</sup> And to entitle the taxpayer to relief against the collection of a personal tax upon the ground that the personalty is exempt, it must appear that such property is included in his assessment. Where, therefore, the plaintiff seeks relief against a tax alleged to be upon personal property belonging to him but which is exempt, and it appears that he has taxable personalty which exceeds in value the amount of his assessment, the relief will be denied.<sup>5</sup>

§ 531. **The doctrine applied to railway property.** The doctrine as above stated is frequently applied in cases of railway property which has been exempted from taxation. Thus, where a statute exempts from taxation the lands of a railway company which are actually occupied by the company in the exercise of its franchise, the collection of a tax upon such lands may properly be enjoined.<sup>6</sup> And while, as we have

S. E., 596; *Phelan v. Smith*, 22 Wash., 397, 61 Pac., 31; *Louisville & N. R. Co. v. Gaines*, 3 Fed., 266. And see *Union & Planters Bank v. City of Memphis*, 49 C. C. A., 455, 111 Fed., 561.

<sup>2</sup> *Illinois Central R. Co. v. County of McLean*, 17 Ill., 291; *Illinois Central R. Co. v. Hodges*, 113 Ill., 323.

<sup>3</sup> *Morris Canal & Banking Co. v. Jersey City*, 1 Beas., 227.

<sup>4</sup> *Yates v. City of Milwaukee*, 92 Wis., 352, 66 N. W., 248.

<sup>5</sup> *Siegfried v. Raymond*, 190 Ill., 424, 60 N. E., 868.

<sup>6</sup> *Marquette, H. & O. R. Co. v. Marquette*, 35 Mich., 504; *Illinois Central R. Co. v. County of McLean*, 17 Ill., 291; *Illinois Central R. Co. v. Hodges*, 113 Ill., 323. See also *Tomlinson v. Branch*, 15 Wal., 460. And see this case as to the effect of a consolidation with an-

already seen, courts of equity are usually averse to interfering with the enforcement of taxes merely upon the ground of their illegality, yet where the threatened injury is of an irreparable and uncertain nature, so that damages at law can not give adequate redress, the aid of equity may be properly invoked. Thus, where the property of a railway company is exempted by law from taxation for a given period of time, a sale of such property for taxes imposed in violation of the law may be enjoined. And the relief is allowed in such case upon the ground of irreparable injury, since a sale of the railroad would necessarily interfere with or suspend its business, and the damages resulting could not by reason of their uncertain character be ascertained.<sup>7</sup> So where a railroad is by its charter exempted from taxation until its income shall reach a certain percentage upon the amount of its cost, it would seem to be proper to enjoin the collection of a tax upon the road until its income has reached the given standard, the relief being granted in such case to prevent irreparable injury, a multiplicity of suits and a cloud upon title.<sup>8</sup>

§ 532. **Lands exempted by United States.** It is also an established rule that where lands have been set apart by the general government for the use of Indian tribes, and have been exempted by law from taxation until they shall be sold and patented to purchasers, the enforcement of a tax upon such lands while thus exempt from taxation may be enjoined.<sup>9</sup> So where lands have been granted by the United States in aid of the construction of a railway, but the legal title has not yet passed from the government, and the lands are not, therefore, subject to taxation by the state in which they are located, the United States still having an interest in them which can not be divested by the exercise of the taxing power on the

other company upon the right to relief in such cases.

<sup>7</sup> *Oliver v. Memphis & L. R. R. Co.*, 30 Ark., 128.

<sup>8</sup> *Mobile & O. R. Co. v. Moseley*, 52 Miss., 127.

<sup>9</sup> *Missouri River, F. S. & G. R. Co. v. Morris*, 13 Kan., 302.

part of the state, a court of equity may enjoin the collection of taxes upon such lands.<sup>10</sup> But an injunction will not be allowed to prevent the enforcement of a tax upon such lands when the title has passed from the government to the railway company, and when the United States has no longer any interest in the lands which would prevent their taxation by the state.<sup>11</sup>

§ 533. **Remission of tax by legislature.** The absolute remission of a particular tax may also afford ground for enjoining an attempt at its enforcement, it being regarded as a competent exercise of legislative power over the subject of taxation to remit a tax as an entirety. And where an act of legislature has remitted a particular county tax upon the property of a railway company, the act not being in conflict with the constitution of the state, a court of equity may set aside a sale of the property of the railway for the tax so remitted, and may enjoin a purchaser at such sale from asserting any title thereunder.<sup>12</sup>

§ 534. **Transfer of taxing power; omission to tax railway property.** But an act of legislature whose terms authorize a transfer or sale of the taxing power of the state with reference to certain corporations, releasing them on certain conditions from further taxation, being held unconstitutional, its enforcement may be enjoined.<sup>13</sup> And in such case any taxpayer or loan creditor of the state has such an interest in the matter as to make him a proper party to the bill.<sup>14</sup> But, although a statute exempting railway corporations from their due proportion of taxation be unconstitutional, the omission in pursuance of the statute to tax the property of such railways in the same ratio that individual citizens are taxed

<sup>10</sup> *Railway Co. v. McShane*, 22 Wal., 444, affirming S. C., 3 Dill., 303, and overruling in part *Railway Co. v. Prescott*, 16 Wal., 603.

<sup>11</sup> *Hunnewell v. Cass County*, 22 Wal., 464.

<sup>12</sup> *Mobile & Girard R. Co. v. Peebles*, 47 Ala., 317.

<sup>13</sup> *Mott v. Pennsylvania R. Co.*, 30 Pa. St., 9.

<sup>14</sup> *Id.*

will not render void a tax levied upon the property of others subject to taxation. Nor will such omission authorize one who has been properly assessed to enjoin the collection of the tax against his own property.<sup>15</sup>

§ 535. **Entire tax not enjoined because part exempt; property in receiver's hands.** While, as we have already seen, equity may properly enjoin the collection of taxes upon property which is legally exempt from taxation, it will not restrain the collection of an entire tax because in determining the valuation of complainant's taxable property in the aggregate the exempted property may have been included as a factor.<sup>16</sup> And where, under the constitution of the state, property used exclusively for school purposes is exempt from taxation, an injunction will not lie to restrain a sale for unpaid taxes when the property is used partly for school purposes and in part as a private residence.<sup>17</sup> Nor is the fact that property has been placed in the hands of a receiver regarded as exempting it from the taxing power of the government. And where, in such case, the warrants in the hands of the tax collectors are regular upon their face and the collectors are acting under them in good faith in the discharge of their duty, a court of equity may properly refuse to enjoin the collection of the tax.<sup>18</sup>

<sup>15</sup> *Muscatine v. Mississippi & M. R. Co.*, 1 Dillon, 536.

<sup>17</sup> *Red v. Johnson*, 53 Tex., 284.

<sup>18</sup> *Stevens v. New York & O. M.*

<sup>16</sup> *Huck v. Chicago & A. R. Co.*, R. Co., 13 Blatch., 104.  
86 Ill., 352.



## IV. MUNICIPAL TAXATION.

- § 536. Rule of non-interference relaxed as to municipal corporations; illustrations.
537. Violation of rule of uniformity; tax upon traders.
538. Invalidity *dehors* the record; omission of property; property improperly included or exempted.
539. Omission of estimate of expense.
540. Dispute as to municipality to which property belongs.
541. Misappropriation of corporate funds.
542. The same.
543. Injunction refused where remedy at law.
544. Equity will not review proceedings of municipal officers.
545. Mere illegality not sufficient ground for injunction.
546. Municipal tax against personal property not ordinarily enjoined.
547. Enlargement of municipal limits.
548. Excessive taxation of lots; real estate excluded from city limits.
549. Acquiescence of property owner as an estoppel.
550. Limitations upon the doctrine of estoppel.
551. Amount due must be paid or tendered; exceptions.
552. When injunction allowed as an incident to other relief.
553. Tax upon business in city; license tax upon occupations.
554. Assessment for improving streets, when enjoined.
555. Repeal of ordinance; premature application; municipal election to vote tax.
556. Assessments for pavements and improvements; assessment based on frontage rule.
557. Municipal bonds illegally issued.
558. Debt due from city can not be set off against tax.
559. Effect of injunction against paying interest on municipal bonds.
560. Advertising for bids.
- 560a. Fraud as ground for relief.
- 560b. Irregularities in organization of municipal corporation no ground for injunction.

§ 536. Rule of non-interference relaxed as to municipal corporations; illustrations. It will be found upon examination that courts of equity have been inclined in cases of assessments by municipal corporations to relax somewhat the stringency of the rule of non-interference as applied to the collection of

state taxes, and relief by injunction has been more freely granted against the collection of municipal taxes than in cases affecting the collection of revenues by the state.<sup>1</sup> And while it is difficult to perceive any sufficient reason for such distinction, the distinction itself remains. Thus, it is held that the general rule denying relief in equity against the collection of an illegal tax, in the absence of special circumstances bringing the case within some recognized head of equity jurisdiction, applies only to taxes levied by the sovereign, and not to taxes or assessments imposed by inferior bodies, such as municipal corporations.<sup>2</sup> And a sale of real estate in satisfaction of a municipal tax imposed without authority has been enjoined upon the ground of preventing a cloud upon title.<sup>3</sup> The relief has also been granted, even though no question as to cloud upon title was raised.<sup>4</sup> So the collection of a municipal tax such as a special assessment or a poll tax will be enjoined where the municipality was wholly without power under its charter to levy the tax in question.<sup>5</sup> So a municipal tax levied for the support of public schools, which was illegal because the question of such taxation was not submitted to the taxpayers and voters of the city, has been enjoined.<sup>6</sup> And although a tax be authorized by act

<sup>1</sup> See opinion of Miller, J., in *Parmley v. Railroad Companies*, 3 Dill., 25.

<sup>2</sup> *Alexandria C. R. & B. Co. v. District of Columbia*, 1 Mackey, 217. And in the same case it is held that § 3224 of the Revised Statutes of the United States, which provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," applies only to cases arising under the internal revenue laws of the United States, and not to assessments imposed by a municipality,

even though done under authority of the laws of the United States.

<sup>3</sup> *Smith v. Longe*, 20 Fla., 697.

<sup>4</sup> *Foster v. Kenosha*, 12 Wis., 616; *Toledo v. Lafayette*, 22 Ind., 262.

<sup>5</sup> *Lee v. Town of Mellette*, 15 S. Dak., 586, 90 N. W., 855; *Morris v. Cummings*, 91 Tex., 618, 45 S. W., 383.

<sup>6</sup> *City of Fort Worth v. Davis*, 57 Tex., 225. As to the right to enjoin the collection of a tax voted by a school district for the erection of a school-house, see *Casey v. Independent District*, 64 Iowa, 659, 21 N. W., 122.

of legislature, yet where the municipal authorities have disregarded and failed to comply with all the requirements of the statute, equity will enjoin a sale of land for such tax upon the ground that the proceedings are *coram non judice* and void.<sup>7</sup> So an injunction is regarded as the appropriate remedy to prevent the enforcement of a municipal tax in excess of the limit prescribed by the constitution of the state.<sup>8</sup> And where a county officer is authorized by law to levy, in addition to the regular taxes, a special or extraordinary tax, with the consent of two-thirds of the grand jury of the county, for certain purposes enumerated by law, such as the discharge of judgments against the county, he may be enjoined from making such levy without the consent of the requisite number of the grand jury, and when it is not clearly shown that the tax is necessary for the special purposes prescribed by law.<sup>9</sup> So the owner of lots in a city, whose property is assessed for street improvements, may maintain an action against the city for an injunction when his assessment has been increased by the unauthorized omission by the assessors of other lands from the assessment.<sup>10</sup> In such case, the assessors not having complied with the law and the assessment being confirmed by the common council of the city without legal right, there is an excess of authority which is absolutely fatal to the assessment, the case being properly distinguishable from that of a mere irregularity in the exercise of an unquestioned power.<sup>11</sup> So upon a bill by a tax-

<sup>7</sup> Mayor *v.* Porter, 18 Md., 284; 569, 8 S. W., 718. See also City Holland *v.* Mayor, 11 Md., 186; of Springfield *v.* Edwards, 84 Ill., Bouldin *v.* Mayor, 15 Md., 18; 626.

Mayor *v.* Grand Lodge, 44 Md., 436; Morris *v.* Merrell, 44 Neb., 423, 62 N. W., 865. See also Butler *v.* City of Detroit, 43 Mich., 552, 5 N. W., 1078.

<sup>9</sup> Couper *v.* Rowe, 42 Ga., 229.

<sup>8</sup> Overall *v.* Ruenzi, 67 Mo., 203; Howell *v.* City of Peoria, 90 Ill., 104; Arnold *v.* Hawkins, 95 Mo.,

<sup>10</sup> Hassan *v.* City of Rochester, 65 N. Y., 516, reversing S. C., 6 Lans., 185; Same *v.* Same, 67 N. Y., 528.

<sup>11</sup> Hassan *v.* City of Rochester, 67 N. Y., 528.

payer to enjoin a municipal corporation from incurring any indebtedness in excess of the maximum fixed by the constitution as the limit of municipal indebtedness, it is proper, in connection with such injunction, to enjoin the levying of taxes in payment of the indebtedness beyond the constitutional limit.<sup>12</sup> And where the municipal authorities have levied a tax to an amount which exceeds the limit prescribed by law, the collection of such a tax will be enjoined. Thus, where a statute provided that the county board should make a levy for each fund, but imposed a limitation upon the levy, which should consist of the entire amount of the salaries for the year with an addition of twenty-five per cent. for delinquents, a tax levied in excess of such limitation is illegal and its enforcement will be enjoined.<sup>13</sup> So where town authorities, in levying taxes, are confined by law to the valuation placed upon property for state and county taxes, but in violation of such provision are assessing it at a higher rate, equity will enjoin the collection of that portion of the tax which is founded upon such illegal excess.<sup>14</sup>

§ 537. **Violation of rule of uniformity; tax upon traders.** The violation by municipal officers in levying a tax of the rule of uniformity in taxation as prescribed by the constitution of the state affords sufficient ground for enjoining them from proceeding with the collection of the tax.<sup>15</sup> Thus, where the authorities of a city, in imposing a municipal tax upon

<sup>12</sup> *City of Springfield v. Edwards*, 84 Ill., 626; *Culbertson v. City of Fulton*, 127 Ill., 30, 18 N. E., 781.

<sup>13</sup> *Wiggins v. A., T. & S. F. R. Co.*, 9 Okla., 118, 59 Pac., 248.

<sup>14</sup> *Tygart's Valley Bank v. Town of Philippi*, 38 West Va., 219, 18 S. E., 489.

<sup>15</sup> *Young v. Town of Henderson*, 76 N. C., 420; *Gould v. Mayor of Atlanta*, 55 Ga., 678; *Shenandoah*

*Valley R. Co. v. Supervisors*, 78 Va., 269. But in *Young v. Town of Henderson*, 76 N. C., 420, it is held that where the tax is levied for the payment of a judgment rendered against the municipality, the court will not, in such collateral proceeding, permit the judgment to be questioned or impeached, in the absence of any allegations of fraud, but will regard it as *res judicata*.

traders exercising their vocation within the city, unjustly discriminate between resident and non-resident traders, in violation of the constitutional rule of uniformity, an injunction is the appropriate remedy.<sup>16</sup> And the great hardship and oppression of an illegal municipal ordinance imposing such a tax, coupled with the severity of its penal provisions and the forfeiture of goods imposed for non-payment of the tax are regarded as affording sufficient grounds for relief in equity, notwithstanding a remedy at law.<sup>17</sup> Where, however, it is sought to restrain the collection of municipal taxes upon real property, which are regularly assessed under a general ordinance for raising revenue to meet the current expenses of a city, the sole ground upon which the relief is sought being a violation of the rule of uniformity, an appellate court will not revise the action of the court below in refusing a preliminary injunction, when the questions involved are of grave importance, embracing the entire system of municipal finance of the state.<sup>18</sup>

§ 538. **Invalidity *dehors* the record; omission of property; property improperly included or exempted.** When an invalid municipal tax or assessment is regular upon its face, the invalidity appearing only by evidence *dehors* the record, its enforcement may be prevented by injunction.<sup>19</sup> And when municipal assessors in making an assessment have acted upon an erroneous principle and have omitted property benefited by the improvement, in disregard of the provisions of a charter requiring the assessment to be made upon property benefited by the improvement in proportion to the advantages derived therefrom, relief by injunction may properly be invoked.<sup>20</sup> So if, in disregard of such requirements of the charter, they

<sup>16</sup> Gould v. Mayor of Atlanta, 55 Ga., 678.

<sup>17</sup> Id.

<sup>18</sup> Wayne v. Mayor of Savannah, 56 Ga., 448.

<sup>19</sup> Ogden City v. Armstrong, 163 U. S., 224, 18 Sup. Ct. Rep., 98.

<sup>20</sup> Clark v. Village of Dunkirk, 12 Hun, 181; Kennedy v. City of Troy, 14 Hun, 308.



have assessed property which can not possibly be benefited by the improvement, equity may relieve by injunction.<sup>21</sup> And where the authorities of a city have exempted certain property from taxation, thereby increasing the burden upon other property, the exemption being illegal, an injunction will be granted to prevent the sale for taxes of the lands so assessed, upon the ground that the omission was intentional and not the result of accident.<sup>22</sup> So when an assessment of property for municipal taxation has been corrected in the manner and by the tribunal fixed by law for such purpose, but the municipal authorities proceed to levy the tax upon the original assessment which has been invalidated, the appropriate remedy is by injunction.<sup>23</sup>

§ 539. **Omission of estimate of expense.** Where the charter of a city authorizes municipal improvements, such as the making of sewers or opening of streets, to be paid by taxes imposed upon property benefited thereby, but imposes certain conditions upon the city as necessary to give it jurisdiction to make the assessment, a strict compliance with such conditions is usually required to sustain the validity of the assessment. And where the charter requires, as such a condition, that an estimate be made of the whole expense of the work and of the amount to be charged against each lot, which estimate shall be filed in the office of the city clerk for the inspection of all parties in interest, the making and filing of such estimate by the city authorities are jurisdictional in their nature and their omission renders the proceeding entirely void. A court of equity may, therefore, in such a case, enjoin a sale of the lots for such assessment, or, if the sale has already been made, may enjoin the issuing of a tax deed upon the certificate of sale.<sup>24</sup>

<sup>21</sup> Longley v. City of Hudson, 4 Thomp. & C., 353.

<sup>23</sup> City of Richmond v. Crenshaw, 76 Va., 936.

<sup>22</sup> Weeks v. Milwaukee, 10 Wis., 242; Hersey v. Supervisors, 16 Wis., 185.

<sup>24</sup> Massing v. Ames, 37 Wis., 645; Pound v. Supervisors of Chippewa Co., 43 Wis., 63.

§ 540. **Dispute as to municipality to which property belongs.** Relief by injunction is also granted for the purpose of preventing the enforcement of a tax by a municipality other than that to which the property assessed rightfully belongs.<sup>25</sup> For example, when the same property is taxed in two different counties, each claiming the right to levy a tax thereon, there being a dispute between the counties as to their territorial boundaries, the enforcement of the tax by the county to which the property does not pertain may be enjoined.<sup>26</sup> So the owner of land situated in two adjacent towns, who has been assessed by the municipal authorities of both, may have relief by a bill in the nature of a bill of interpleader against the tax collectors of the different towns to determine to which of them the tax is due, and in such action he is entitled to an injunction to restrain the collection of the illegal tax.<sup>27</sup>

§ 541. **Misappropriation of corporate funds.** While courts of equity do not interfere with the action of municipal officers under their legislative or discretionary powers, they will yet relieve by injunction in behalf of citizens and taxpayers to prevent the corporate officers of a municipality from a misappropriation of its property and funds. And where, without legal authority, the common council of a village have purchased land, erected buildings thereon for private purposes, and have issued municipal bonds pledging the corporate property and its faith and credit for their payment, and have sold such bonds to their own members, so gross a breach of trust and fraud upon taxpayers will warrant a court of equity in enjoining the collection of a tax imposed for the payment of interest upon such bonds.<sup>28</sup>

<sup>25</sup> Eversole v. Cook, 92 Ind., 222.

<sup>27</sup> Dorn v. Fox, 61 N. Y., 264,

<sup>26</sup> Union Pacific R. Co. v. Carr,

reversing S. C., 6 Lans., 162.

1 Wyoming, 96. But see, *contra*,  
Chisholm v. Adams, 71 Tex., 678,  
10 S. W., 336.

<sup>28</sup> Sherlock v. Village of Winnetka, 59 Ill., 289; S. C. upon final hearing, 68 Ill., 530.

§ 542. **The same.** Where a city has itself created a nuisance by the construction of its streets in such a manner as to cause the water to stand upon certain lots, it can not, for the purpose of abating the nuisance, tax the lots themselves, and a sale of such lots for payment of the tax will be enjoined.<sup>29</sup> And a city being regarded as in the nature of a trustee for the corporators, an unauthorized appropriation of its funds, as for the celebration of the Fourth of July, may be enjoined by taxpayers.<sup>30</sup> So where, in violation of its charter, a municipal corporation is about to issue its bonds and securities for a purpose unauthorized by law, and to levy a tax for the payment thereof, property owners liable to such tax are entitled to an injunction against the municipal authorities upon the ground of preventing a multiplicity of suits. But such individual taxpayers can not restrain the municipal authorities from controlling and disposing of so much of the tax as has already been collected, and if any illegal appropriation of such money is attempted or threatened, it can only be restrained upon complaint of some one representing the entire public to whom the money belongs.<sup>31</sup>

§ 543. **Injunction refused where remedy at law.** Although relief by injunction is, as we have thus seen, more freely granted in cases of municipal assessments than in cases of general taxes, still if the objections may be urged and the grievances adjusted in a court of law, equity will not interfere with the assessment.<sup>32</sup> And where, by the proceedings of the corporate authorities in making the assessment, a remedy is provided for all persons aggrieved, and the proceed-

<sup>29</sup> *Weeks v. Milwaukee*, 10 Wis., 242.

<sup>30</sup> *New London v. Brainard*, 22 Conn., 552.

<sup>31</sup> *Coulson v. Portland*, *Deady's Reports*, 481.

<sup>32</sup> *McBride v. Chicago*, 22 Ill., 574; *Ottawa v. Chicago & R. I. R.*

*Co.*, 25 Ill., 43; *Fajder v. Village of Aitkin*, 87 Minn., 445, 92 N. W., 332, 934; *Kerr v. City of Waseca*, 88 Minn., 191, 92 N. W., 932; *Riddle v. Town of Charlestown*, 43 West Va., 796, 28 S. E., 831. And see *Douglass v. Town of Harrisville*, 9 West Va., 162.

ings may be removed by *certiorari* to the proper tribunal, an injunction will not be granted.<sup>33</sup> So equity will not enjoin the sale of lands under a judgment for a delinquent special assessment upon the ground that the improvement was not made in compliance with the provisions of the ordinance, since the aggrieved party has a complete remedy at law by *mandamus* to compel the city to construct and complete the work in accordance with the specifications of the ordinance.<sup>34</sup> And in no event will such a sale be enjoined upon grounds of which the taxpayer might have availed himself by way of objection either to the judgment of confirmation or of sale.<sup>35</sup> Nor will an injunction be allowed to restrain the exercise of the municipal authority of a city in the levying and collection of a tax upon the ground that the passage of an ordinance in relation to the tax is in violation of the city charter.<sup>36</sup>

§ 544. **Equity will not review proceedings of municipal officers.** It is also to be borne in mind in determining the nature and extent of the jurisdiction of equity in restraint of municipal taxation, that a court of equity will not sit as a court of errors to review and correct the proceedings of municipal bodies and of inferior political jurisdictions empowered by law with the levying of assessments, this being properly matter of legal rather than equitable cognizance.<sup>37</sup>

<sup>33</sup> *Betts v. Williamsburgh*, 15 Barb., 255; *United Lines T. Co. v. Grant*, 137 N. Y., 7, 32 N. E., 1005.

<sup>34</sup> *Callister v. Kochersperger*, 168 Ill., 334, 48 N. E., 156; *Heinroth v. Kochersperger*, 173 Ill., 205, 50 N. E., 171; *Craft v. Kochersperger*, 173 Ill., 617, 50 N. E., 1061.

<sup>35</sup> *Smith v. Kochersperger*, 180 Ill., 527, 54 N. E. 614; *Field v. Village of Western Springs*, 181 Ill., 186, 54 N. E., 929. See *Rusk v. Berlin*, 173 Ill., 634, 50 N. E., 1071; *Watkins v. Griffith*, 59 Ark., 344, 27 S. W., 234.

<sup>36</sup> *Page v. St. Louis*, 20 Mo., 137.

<sup>37</sup> *Mayor v. Meserole*, 26 Wend., 132, reversing S. C., 8 Paige, 198; *Heywood v. Buffalo*, 14 N. Y., 534; *Blake v. Brooklyn*, 26 Barb., 101; *Lambeth v. DeBellevue*, 24 La. An., 394; *West v. Ballard*, 32 Wis., 168; *Brodnax v. Groom*, 64 N. C., 244. See also *Mitchell v. Board of Commissioners*, 74 N. C., 489. And in *Blake v. Brooklyn*, 26 Barb., 101, the court say: "If the assessment be illegal or unconstitutional, the plaintiff can not be compelled to pay it, and he need

Thus, upon a bill to enjoin the collection of state and municipal taxes, the courts will not undertake to exercise a supervisory control over municipal officers charged by law with the duty of determining the amount of the tax. Such officers being a branch of the political department of the government, and having of necessity certain discretionary powers in the performance of their duties, the court will not, in such a proceeding, inquire into the propriety of their appropriations, and will only enjoin when they have acted without authority, or when they have violated some special provision of law.<sup>38</sup> Nor will the title of defendants to their offices in such case be inquired into upon the proceeding for an injunction.<sup>39</sup> So upon a bill to enjoin a tax levied for the payment of indebtedness due from a town, the court will not review the allowance by the town officers of claims against the town.<sup>40</sup> And where the taxing power is vested in county officers under proper legislative authority, subject to the restriction or condition that it shall be exercised only for the necessary expenses of the county, a court of equity will not attempt by injunction to interfere with the discretion of such officers as to what constitute necessary expenses.<sup>41</sup> So when the taxing power

not anticipate in this way (by injunction), this defense to a suit at law. The assessment is not yet laid or its amount ascertained; indeed the work is not done or even commenced, and therefore there can not be a pretense of a cloud upon the title of the land. If an assessment were laid, however, for the expense of this improvement, it is well settled that a bill in equity and an injunction are not the proper means to review or correct such proceedings of a municipal corporation. There are sufficient common law remedies in such cases, and a court of equity

will not extend its jurisdiction to review such proceedings, unless they are productive of peculiar or irreparable injury to the land of the plaintiff or must lead to a multiplicity of suits."

<sup>38</sup> *Lambeth v. DeBellevue*, 24 La. An., 394; *Lemont v. Singer & T. S. Co.*, 98 Ill., 94.

<sup>39</sup> *Lambeth v. DeBellevue*, 24 La. An., 394.

<sup>40</sup> *Lemont v. Singer & S. T. Co.*, 98 Ill., 94.

<sup>41</sup> *Brodnax v. Groom*, 64 N. C., 244. See also *Mitchell v. Board of Commissioners*, 74 N. C., 489.



is fully and absolutely vested in a board of municipal officers, such as a county board of supervisors, without qualification or restriction, and the property in question is subject to taxation, equity will not ordinarily interfere by injunction to restrain the levy and collection of the tax, but will leave the taxpayer who is aggrieved by any irregularities or errors in the assessment to his appropriate legal remedy. The taxing power in such case is regarded as in the nature of a legislative power, and the courts are loth to interfere with the action of municipal officers instructed with such power, for the purpose of determining the necessary amount of taxes to be levied. In other words, the power to levy the tax being conceded, and the property being subject to taxation, equity should not enjoin because of irregularities or excessive assessments, but should leave complainant to pursue his legal remedy. And when such board of officers is charged with levying a larger amount of taxes than is necessary, with the fraudulent design of applying such excess to an unlawful purpose, the court may refuse to enjoin the assessment, and wait until it is attempted to appropriate the money illegally, and may then enjoin if unable to afford any adequate legal remedy.<sup>42</sup>

§ 545. **Mere illegality not sufficient ground for injunction.** The general doctrine which has been discussed in the preceding pages, denying relief by injunction against the collection of a general tax upon the ground of a mere illegality when it is not shown that its enforcement would lead to a multiplicity of suits, or produce irreparable injury or a cloud upon title, is equally applicable to an assessment made by a board of municipal officers, which is levied in the exercise of the taxing power for purposes of local improvement.<sup>43</sup> So it is held in Wisconsin that the fact of voters at a town meeting having voted an illegal tax is not of itself sufficient

<sup>42</sup> *West v. Ballard*, 32 Wis., 168. *Sperry v. City of Albina*, 17 Ore.,

<sup>43</sup> *Dean v. Davis*, 51 Cal., 406; 481, 21 Pac., 453.

reason for restraining the town officers from carrying the action of the voters into effect. And in withholding equitable relief in such case the court proceeds upon the principle that if the vote is carried into effect and an illegal tax is assessed it will not necessarily result in irreparable injury, since plaintiffs will have their action at law to recover back the money, if paid under protest, or on levy or distraint of personal property; or if the tax be extended against their real estate, they will have a remedy in equity to remove the supposed cloud from their title.<sup>44</sup> An additional reason for withholding relief by injunction in such case is found in the great public inconvenience which would result from the exercise of the jurisdiction under such circumstances, since by such exercise of preventive relief it would lie in the power of every taxpayer to arrest by injunction all proceedings upon the part of public officers in the discharge of their duties, and to compel such officers to come into a court of justice to establish and defend the correctness of their proposed official acts before proceeding to their performance.<sup>45</sup>

§ 546. **Municipal tax against personal property not ordinarily enjoined.** Although relief by injunction has been allowed against a sale of lands in satisfaction of municipal taxes which were void,<sup>46</sup> or where there has been a failure to comply with the requirements of the law, the courts are exceedingly averse to interfering with a sale of personalty, preferring to leave the aggrieved taxpayer in such case to pursue his legal remedy.<sup>47</sup> And in cases of municipal taxes or assessments levied upon personal property, equity will not interfere by injunction merely because of the illegality of

<sup>44</sup> *Judd v. Town of Fox Lake*, 28 Wis., 583; *Sage v. Town of Fifield*, 68 Wis., 546, 32 N. W., 629.

<sup>45</sup> *Judd v. Town of Fox Lake*, 28 Wis., 583.

<sup>46</sup> *Mayor v. Porter*, 18 Md., 284;

*Ladd v. Spencer*, 23 Ore., 193, 31 Pac., 474.

<sup>47</sup> *Mayor v. Baldwin*, 57 Ala., 61; *Baldwin v. Tucker*, 16 Fla., 258; *Williams v. Mayor*, 2 Mich., 560.

the tax, since in such case the taxpayer may find ample remedy at law by an action for the trespass which would result from the collection of such tax.<sup>48</sup> So where authority is conferred by statute upon the common council of a city to make an assessment for paving, the court will not restrain the execution of a warrant against the goods and chattels of complainant in satisfaction of such assessment because of irregularities in the exercise of the power.<sup>49</sup>

§ 547. **Enlargement of municipal limits.** The extension by legislative enactment of the boundaries of a city or municipality, so as to embrace agricultural and farming lands and to subject them to larger burdens of municipal taxation, has given rise to frequent applications for preventive relief by injunction against the enforcement of the taxes thus imposed. There is a direct conflict of authority in the adjudicated cases upon the right to equitable relief in this class of cases. Upon the one hand, it has been held that where by legislative action the limits of a city have been extended by taking in a large amount of lands not necessary for municipal purposes, the sole object of such legislation being to make the lands in question liable to city taxation, the collection of such taxes may be properly enjoined.<sup>50</sup> Upon the other hand, the better doctrine undoubtedly is, that, so long as the power of taxation conferred by the legislative department of government upon a municipal corporation is not in contravention of the constitution of the state, and so long as its exercise is confined within the limits prescribed by law, equity will not enjoin the collection of a municipal tax imposed upon complainant's property because of its being farming property, and because of the extension by legislative enactment of municipal limits so

<sup>48</sup> *Mayor v. Baldwin*, 57 Ala., 61; *a town other than that of the situs*  
*Baldwin v. Tucker*, 16 Fla., 258. of the property. *Eversole v. Cook*,  
But in Indiana it is held that an 92 Ind., 222.

injunction will lie to prevent a <sup>49</sup> *Williams v. Mayor*, 2 Mich.,  
sale of personal property in satis- 560.

faction of an assessment levied by <sup>50</sup> *Langworthy v. Dubuque*, 13

as to include such property. In such case, whether the power is wisely or unwisely bestowed, or whether its exercise is or is not burdensome upon the citizen, are questions whose determination rests with the legislative rather than with the judicial department, and equity will not, therefore, interfere by injunction.<sup>51</sup> And in a proceeding to restrain the collection of a municipal tax upon property which has been thus taken within the boundaries of a city, the court will not inquire into or consider the motives which may have led to such action.<sup>52</sup> But where, under the laws of a state, a board of county commissioners are authorized upon the application of the common council of a city to annex contiguous territory to the city, but their authority is limited to granting such petition as a whole and they have no power to annex a part only of the property petitioned for, the annexation of a part will be treated as void, and the enforcement of taxation by the city authorities upon the part so annexed will be enjoined.<sup>53</sup> And when the proceedings for such annexation are wholly void because of non-compliance by such board with the statute conferring their jurisdiction, equity may restrain the collection by the city of taxes upon the lands so annexed.<sup>54</sup> Where, however, complainants have been guilty of great laches in asserting their rights, and have acquiesced for a series of years in the annexation, they will be estopped from enjoining, upon the ground of the invalidity of the annexation, a tax imposed upon their property annexed by the municipality.<sup>55</sup>

Iowa, 86; *Fulton v. City of Davenport*, 17 Iowa, 404. And see *Bradshaw v. City of Omaha*, 1 Neb., 16.

<sup>51</sup> *Groff v. Mayor of Frederick City*, 44 Md., 67; *Manley v. Raleigh*, 4 Jones Eq., 370. And see *Cooley on Taxation*, 120, where the reasons for withholding equitable relief in such cases are very clearly presented. See also *Graham v.*

*City of Greenville*, 67 Tex., 62, 2 S. W., 742.

<sup>52</sup> *City of Logansport v. Seybold*, 59 Ind., 225.

<sup>53</sup> *City of Peru v. Bearss*, 55 Ind., 576.

<sup>54</sup> *Windman v. City of Vincennes*, 58 Ind., 480.

<sup>55</sup> *City of Logansport v. La Rose*, 99 Ind., 117.

§ 548. **Excessive taxation of lots; real estate excluded from city limits.** It is proper, however, to grant relief by injunction where city lots used by a railway company as a right of way are properly taxable as a right of way, but when in addition thereto they have been subjected to an increased assessment as town and city lots.<sup>56</sup> And where the law provides that no special assessment charged against real estate for improvements shall exceed one-quarter of the value of the realty and an assessment is levied beyond that amount, the excess will be enjoined.<sup>57</sup> And where a tract of land forming an addition to a city has been vacated and should thereafter be taxed as an entire tract, instead of by separate lots as before the vacation, but portions of the tract are illegally assessed as lots, the enforcement of the tax as to such portions may be prevented by injunction.<sup>58</sup> So where, by an amendment to the charter of a city, a portion of complainant's real estate is placed outside the limits of the municipality, so that there is no power upon the part of the city authorities to sell such real estate for delinquent taxes, although situated within the city boundaries when the taxes became due and payable, they may be enjoined from making such sale.<sup>59</sup>

§ 549. **Acquiescence of property owner as an estoppel.** The doctrine of equitable estoppel is frequently invoked for the purpose of defeating applications for equitable relief against municipal taxation, when complainant's conduct has been such as to debar him from the relief sought. And it may be laid down as a general rule that where one has assented to the levying of a tax, either by directly petitioning that it be assessed for certain purposes, or by standing idly by and failing to avail himself of the remedy provided by law for

<sup>56</sup> *Chicago & N. W. R. Co. v. Miller*, 72 Ill., 144.

<sup>57</sup> *Birdseye v. Village of Clyde*, 61 Ohio St., 27, 55 N. E., 169.

<sup>58</sup> *Stebbins v. Challiss*, 15 Kan., 55.

<sup>59</sup> *Deason v. Dixon*, 54 Miss., 585.



questioning the regularity of the proceedings, he is estopped from obtaining relief in equity, even though the proceedings were absolutely null and void.<sup>60</sup> Thus, property holders who have petitioned the proper authorities for the paving of a street, and who, during the progress of the work, have made no objection, will not be allowed to enjoin the collection of the assessment. They are in such case considered as having actively consented to the proceedings resulting in the assessment, and their implied assent will be presumed to the assessment itself.<sup>61</sup> And under such circumstances the question of the legality of the assessment will not vary the case, since, if it be invalid, the remedy of the parties aggrieved is at law.<sup>62</sup> And the owner of city lots who, with full notice of all the proceedings, encourages contractors to go on with the grading of a street and assures them that they shall be paid, is estopped from invoking the aid of equity to enjoin the collection of a special tax upon his lots to pay for such grading.<sup>63</sup> So when a land owner whose property is benefited by

<sup>60</sup> *Kellogg v. Ely*, 15 Ohio St., 64; *Jackson v. Detroit*, 10 Mich., 248; *King v. Ford River L. Co.*, 93 Mich., 172, 53 N. W., 10; *Weber v. San Francisco*, 1 Cal., 455; *Peoria v. Kidder*, 26 Ill., 351; *Meadowcroft v. Kochersperger*, 170 Ill., 356, 48 N. E., 987; *Sexsmith v. Smith*, 32 Wis., 299; *Ritchie v. City of South Topeka*, 38 Kan., 368, 16 Pac., 332; *Stewart v. Board of Commissioners*, 45 Kan., 708, 26 Pac., 683, 23 Am. St. Rep., 746; *Wingate v. Astoria*, 39 Ore., 603, 65 Pac., 982, 6 Munic. Corp. Cas., 815; *Byram v. Detroit*, 50 Mich., 56, 12 N. W., 912, 14 N. W., 968. And see this case as to the effect upon the application for an injunction of a subsequent act of the legislature authorizing a re-assess-

ment for the improvement in question. See also *Montgomery v. Waseem*, 116 Ind., 343, 15 N. E., 795, 19 N. E., 184; *Darst v. Griffin*, 31 Neb., 668, 48 N. W., 819. But in *Hopkins v. Greensburg Company*, 40 Ind., 44, it is held that the owners of lands illegally assessed for the construction of public roads are not estopped from enjoining the assessment because they have stood by and seen the work progress without objection, or because they have used the road after its construction. See also *Greensburg Company v. Sidener*, 40 Ind., 424; *Pavy v. Greensburg Company*, 42 Ind., 400.

<sup>61</sup> *Motz v. Detroit*, 18 Mich., 495.

<sup>62</sup> *Id.*

<sup>63</sup> *Sleeper v. Bullen*, 6 Kan., 300.

a municipal improvement, such as the improvement of a highway or street, has suffered the proceedings to go on with full knowledge thereof and without objection until the work is substantially completed, he is estopped in equity from relief by injunction against an assessment levied for payment of such improvement.<sup>64</sup> And where the plaintiff, a citizen and taxpayer, joins in a petition to the common council of a city for the improvement of a street in front of his premises, and interposes no objection to the work until after its completion, he can not be permitted to enjoin the issuing of a tax deed upon the sale of his premises for a tax levied for the payment of such improvement.<sup>65</sup> So property owners upon the line of a street whose property is subject to assessment for street improvements can not enjoin the city from making or enforcing assessments upon their premises in payment for such improvements, upon the ground that the work has not been done according to contract, or because of defects in its execution, when they have permitted it to be completed and accepted and the contract price to be paid before seeking relief in equity.<sup>66</sup> But where a statute provides that assessments for the improvement of real estate shall not exceed one-quarter of the value thereof, a property owner will not be prevented from enjoining an assessment which exceeds that amount by the fact that he joined in the petition for the improvement, since he had no reason to know that the limitation thus imposed would be exceeded.<sup>67</sup>

<sup>64</sup> *Quinlan v. Myers*, 29 Ohio St., 500; *Ritchie v. City of South Topeka*, 38 Kan., 368, 16 Pac., 332; *Byram v. Detroit*, 50 Mich., 56, 12 N. W., 912, 14 N. W., 968; *Atwell v. Barnes*, 109 Mich., 10, 66 N. W., 583; *Fitzhugh v. City of Bay City*, 109 Mich., 581, 67 N. W., 904.

<sup>65</sup> *Sexsmith v. Smith*, 32 Wis., 299. And the court also hold that in such a case it is proper to take into consideration a provision of

the city charter that the signing of a petition for a street improvement shall be construed as a release of all claim for damages resulting from such improvement.

<sup>66</sup> *Liebstein v. Mayor*, 9 C. E. Green, 200; *Dusenbury v. Mayor*, 10 C. E. Green, 295. See also *Lewis v. City of Elizabeth*, 10 C. E. Green, 298.

<sup>67</sup> *Birdseye v. Village of Clyde*, 61 Ohio St., 27, 55 N. E., 169.

§ 550. **Limitations upon the doctrine of estoppel.** Notwithstanding the well established doctrine of equitable estoppel as applied to the class of cases under consideration, a distinction has been drawn in its application between cases where relief is sought upon the ground of some irregularity, and cases where the tax is absolutely null and void. And in the latter class of cases it is held that the fact of complainant having delayed seeking relief until the improvement for which the assessment is levied is completed, or until his property is advertised for sale, does not constitute such laches or acquiescence as to debar him from relief by injunction.<sup>68</sup> So the fact that the owner of property abutting upon a public street has failed to enjoin the prosecution of a work of improvement upon the street, which has been illegally ordered by the municipal authorities, and has paid one assessment for the work under protest, will not operate as an estoppel to prevent him from obtaining an injunction against the collection of a subsequent assessment levied for the same work after its completion.<sup>69</sup> And it has been held that where an injunction against a tax levied in aid of a public improvement is resisted upon the ground of plaintiff's acquiescence in the work without objection during its progress, the answer relying upon this as an estoppel, it is not a sufficient bar to the relief unless it is shown that plaintiffs had a right of action for which they might have instituted proceedings earlier for the purpose of enjoining the tax.<sup>70</sup>

§ 551. **Amount due must be paid or tendered; exceptions.** The maxim that he who would have equity must first do equity is applicable to cases where relief is sought by injunction against municipal taxation, as well as to other branches of the law of injunctions.<sup>71</sup> And where a special assessment is made

<sup>68</sup> *Holland v. Mayor*, 11 Md., 186; *Mayor v. Porter*, 18 Md., 284; *Mayor v. Grand Lodge*, 44 Md., 436; *Harmon v. City of Omaha*, 53 Neb., 164, 73 N. W., 671.

<sup>69</sup> *Tallant v. City of Burlington*, 39 Iowa, 543.

<sup>70</sup> *Sim v. Hurst*, 44 Ind., 579.

<sup>71</sup> *Meadowcroft v. Kochersperger*, 170 Ill., 356, 48 N. E., 987.

upon city lots for the improvement of adjacent streets, and by mistake a portion of plaintiff's land is assessed for too large a sum, but the amount of such excess is plainly ascertainable from an inspection of the assessment roll, the collection of the excess will be enjoined only upon condition of plaintiff paying the amount which is properly due.<sup>72</sup> So a property owner in a city, who acquiesces in the making of street improvements in front of his premises, interposing no objection thereto while the work is in progress, can not be permitted after its completion and its acceptance by the city to enjoin the collection of the entire assessment levied for payment of the work, upon the ground that it was not performed in accordance with the contract, without having tendered the actual value of the improvement.<sup>73</sup> But where a property owner has made his protest against the improvement in anticipation of the proceeding, he may afterward enjoin the enforcement of an illegal assessment based upon such proceeding without first making tender or payment of the amount of benefit conferred.<sup>74</sup> And where the whole plan or system upon which an assessment for improvements is made is illegal, so that the entire assessment falls and there is consequently no means of ascertaining what portion of the charge represents actual benefits received, no tender or payment is required.<sup>75</sup>

§ 552. **When injunction allowed as an incident to other relief.** While, as has already been shown, the existence of an adequate remedy at law generally operates as a complete bar to relief by injunction against illegal taxation, the jurisdiction may properly be exercised as an incident to other equitable relief sought as the principal object of the action, notwithstanding the illegal tax complained of might be remedied

<sup>72</sup> *Mills v. Charleton*, 29 Wis., 400. See *Dean v. Borchsenius*, 30 Wis., 237.

<sup>73</sup> *City of Evansville v. Pfisterer*, 34 Ind., 36.

<sup>74</sup> *Ladd v. Spencer*, 23 Ore., 193, 31 Pac., 474.

<sup>75</sup> *Norwood v. Baker*, 172 U. S., 269, 19 Sup. Ct. Rep., 187; *Bidwell v. Huff*, 103 Fed., 362; *Zehnder v. Barber Asphalt Co.*, 106 Fed., 103.

at law. For example, where the principal object of the action is to annul and set aside an unauthorized and fraudulent contract made by the officers of a municipality, if the facts shown are sufficient to warrant a court of equity in setting aside the contract at the suit of taxpayers, the court may as a subsidiary ground of relief enjoin a tax levied for the purpose of carrying the contract into effect, even though as to the tax alone there would be ample remedy at law. In such case, the court having properly acquired jurisdiction for one purpose may proceed to administer full and complete relief for all purposes; and it will not annul the contract and at the same time permit the tax to be collected only to be recovered back by a multiplicity of suits, but will enjoin the tax as an incident to annulling the contract.<sup>76</sup>

§ 553. **Tax upon business in city; license tax upon occupations.** An injunction has been allowed to prevent a sale of property in satisfaction of a license tax held to be unconstitutional.<sup>77</sup> And where persons are engaged in a particular business in a city, as the owners and keepers of a public stable, upon which they are taxed by a municipal ordinance, and as a necessary incident to their principal business they are engaged in a subordinate occupation, such as the carrying of passengers and baggage for hire, and the city authorities attempt to enforce a separate tax upon the subordinate business, it is held to be no abuse of discretion to grant an interlocutory injunction against the enforcement of the latter tax until the final hearing of the cause.<sup>78</sup> But an injunction will not lie to prevent the enforcement of fines levied by a municipal court

<sup>76</sup> *Peck v. School District No. 4*, 21 Wis., 516.

<sup>77</sup> *Waters P. O. Co. v. City of Little Rock*, 39 Ark., 412. And see *Banger's Appeal*, 109 Pa. St., 79, as to the right to restrain the collection of a tax upon occupations, for want of uniformity. And

in Georgia it is held that a tax levied upon the sales of a particular commodity, such as cotton, in violation of a statute of the state, may be enjoined. *Mayor v. Flournoy*, 65 Ga., 231.

<sup>78</sup> *Mayor of Savannah v. Dehoney*, 55 Ga., 33.



for non-payment of a municipal tax in the nature of a license upon trades or occupations, and to enjoin proceedings for the collection of such tax, when the law under which the license is imposed is not in excess of legislative authority, and when no unjust discrimination has been made in the imposition of the tax upon different occupations.<sup>79</sup>

§ 554. **Assessment for improving streets, when enjoined.** An assessment levied upon lands as an entirety, which is properly chargeable only upon a portion of the premises, has been enjoined. Thus, where an assessment for improving streets was made a charge upon plaintiff's entire property, when only the front to the usual depth of lots was legally chargeable and liable to be assessed for the improvement, the collection of the assessment was enjoined, but without prejudice to the right of the city to collect the amount properly chargeable against plaintiff's lands.<sup>80</sup>

§ 555. **Repeal of ordinance; premature application; municipal election to vote tax.** Equity will not interfere by injunction with the collection of municipal taxes and assessments when no real or immediate necessity exists for relief. It will not, therefore, enjoin the enforcement of a city tax upon the ground of its illegality when the ordinance under which the tax was attempted to be imposed has been repealed.<sup>81</sup> And when some of the complainants filing a bill to restrain the collection of a municipal tax show by the bill that they are not subject to the tax, since they do not come within the provisions of the city ordinance imposing it, but there is sufficient remedy at law for the parties thus aggrieved when an attempt is made to collect the tax, equity should not enjoin.<sup>82</sup> Nor will the municipal authorities of a city be enjoined from holding an election under an act of legislature to submit to the voters

<sup>79</sup> *Blessing v. City of Galveston*, 42 Tex., 621.

<sup>81</sup> *Goodwin v. Mayor of Savannah*, 53 Ga., 410.

<sup>80</sup> *Griswold v. Pelton*, 34 Ohio St., 482. And see *Chamberlain v. Cleveland*, 34 Ohio St., 551.

<sup>82</sup> *Id.*

the question of whether a particular tax shall be levied, even though it be alleged that the act is unconstitutional, since such an injunction would be premature in advance of any actual levy of a tax, and the danger of a tax being levied is too remote to warrant relief in equity.<sup>83</sup>

§ 556. **Assessments for pavements and improvements; assessment based on frontage rule.** As regards the question of equitable relief against municipal assessments for public improvements, such as streets, roads, ditches and kindred improvements, relief by injunction is freely granted when the proceedings of the municipal authorities are had under an unconstitutional law, or are otherwise wholly illegal and void, and hence in excess of the jurisdiction of such bodies, such cases being plainly distinguishable from cases of a mere irregularity in a proceeding where jurisdiction exists.<sup>84</sup> And where the assent of a majority of the property owners fronting upon a street is required to authorize the paving of the street, it is held that without such assent the proceedings are void, and a court of equity has jurisdiction, upon the application of such owners as have not assented, to enjoin a sale of property for such paving.<sup>85</sup> So where the law requires the giving of notice to property owners of resolutions for public improvements, such requirement is jurisdictional in its character and the failure to give the notice constitutes ground for injunctive relief against a special assessment based upon the resolution.<sup>86</sup> And where a special assessment is wholly il-

<sup>83</sup> *Roudanez v. Mayor of New Orleans*, 29 La. An., 271.

<sup>84</sup> *Teegarden v. Davis*, 36 Ohio St., 601; *City of Fort Wayne v. Shoaff*, 106 Ind., 66, 5 N. E., 403; *City of Terre Haute v. Mack*, 139 Ind., 99, 38 N. E., 468; *Curry v. Jones*, 4 Del. Ch., 559; *Hutchinson v. City of Omaha*, 52 Neb., 345, 72 N. W., 218; *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac., 119; *Dietz v. City of Neenah*, 91 Wis.,

422, 64 N. W., 299, 65 N. W., 500; *Beaser v. City of Ashland*, 89 Wis., 28, 61 N. W., 77; *Watkins v. Griffith*, 59 Ark., 344, 27 S. W., 234.

<sup>85</sup> *Ogden City v. Armstrong*, 168 U. S., 224, 18 Sup. Ct. Rep., 98; *Holland v. Mayor*, 11 Md., 186; *Bouldin v. Mayor*, 15 Md., 18; *Harmon v. City of Omaha*, 53 Neb., 164, 73 N. W., 671.

<sup>86</sup> *Joyce v. Barron*, 67 Ohio St.,

legal and void as being based upon the front foot rule and therefore imposed without regard to the question of special benefits conferred, an injunction is the appropriate remedy to restrain the enforcement of the assessment.<sup>87</sup> And in such case, where the rule or system of valuation thus fails, it is not necessary that the property owner should show that the amount charged against his property exceeds the benefits actually accruing or to tender what appears to be the amount of benefit actually conferred.<sup>88</sup> So where an assessment for the construction of public roads is entirely void because of the omission by the assessors of certain lands from their list, the tax may be enjoined at the suit of property owners affected thereby.<sup>89</sup> But the collection of an assessment for paving and improving streets will not be enjoined upon the ground that such paving is an interference with the rights and franchises of a plank-road company having the right to use the street, the injunction being sought, not by the company, but by an adjacent lot owner.<sup>90</sup> Where, however, property owners are about to be damaged by the collection of assessments upon their property for purposes of improvement by an assumed corporation, such as a drainage company, which has never been legally incorporated, although claiming to act in a corporate capacity, they may be allowed an injunction against such assessment, the action being brought against the pretended cor-

264, 65 N. E., 1001; *Ives v. Irey*, 51 Neb., 136, 70 N. W., 961.

<sup>87</sup> *Norwood v. Baker*, 172 U. S., 269, 293, 19 Sup. Ct. Rep., 187; *Cowley v. City of Spokane*, 99 Fed., 840; *Bidwell v. Huff*, 103 Fed., 362; *Zehnder v. Barber Asphalt Co.*, 106 Fed., 103. In *McKee v. Town of Pendleton*, 154 Ind., 652, 57 N. E., 532, the injunction ran against the town authorities restraining them from entering into a contract for the improvement of a street where the assess-

ment therefor was based upon the frontage rule.

<sup>88</sup> *Norwood v. Baker*, 172 U. S., 269, 19 Sup. Ct. Rep., 187; *Bidwell v. Huff*, 103 Fed., 362; *Zehnder v. Barber Asphalt Co.*, 106 Fed., 103.

<sup>89</sup> *Robbins v. Sand Creek Turnpike Co.*, 34 Ind., 461; *Greencastle & Bowling Green Turnpike Co. v. Albin*, 34 Ind., 554; *Forgey v. Northern Gravel Road Co.*, 37 Ind., 118. See *Pendleton Co. v. Barnard*, 40 Ind., 146.

<sup>90</sup> *Bagg v. Detroit*, 5 Mich., 336.

poration by its name as such.<sup>91</sup> But in an action to restrain the sale of lands for an unpaid assessment for improving a street, upon the ground of irregularities in imposing the assessment, the burden of proof rests upon the plaintiff, and no presumption will be indulged against the validity or legality of the acts of the municipal authorities.<sup>92</sup> But a property owner will not be allowed to retain the benefit of a public improvement, such as curbing a street, and after its completion enjoin the collection of the assessment because of irregularities and because of an excessive assessment, without tendering the amount for which his property is justly liable.<sup>93</sup>

§ 557. **Municipal bonds illegally issued.** When an injunction is sought to restrain the collection of a tax levied for the payment of municipal bonds, but the only evidence before the court as to the illegality of the bonds is an averment in the bill that they were illegally issued, and that they were, in fact, never issued by the township by which they purport to be issued, it is not error to refuse a preliminary injunction, since the court can not be fully advised as to the illegality of the bonds upon so general an averment and without further evidence.<sup>94</sup> Nor will the collection of a tax for the payment of warrants issued for an indebtedness against a county be enjoined upon the ground of the illegality of such warrants, when the holders of the warrants are not parties to the suit.<sup>95</sup>

§ 558. **Debt due from city can not be set off against tax.** Equity will not enjoin a municipal corporation from collecting taxes due from a citizen who occupies the relation of creditor toward the corporation until the debt due to the taxpayer from the municipality is paid, since the courts will not permit

<sup>91</sup> *Newton County Draining Cook v. City of Racine*, 49 Wis., Company *v.* Nofsinger, 43 Ind., 566. 243. See, *ante*, § 551.

<sup>92</sup> *Tingue v. Village of Port Chester*, 101 N. Y., 294, 4 N. E. 625. <sup>94</sup> *Olmstead v. Koester*, 14 Kan., 463.

<sup>93</sup> *Barker v. City of Omaha*, 16 Neb., 269, 20 N. W., 382. See also <sup>95</sup> *Beck v. Allen*, 58 Miss., 143.

a debt to be thus set off against a tax due from the citizen. And the reason for the rule is found in the fact that a tax due from a taxpayer is not a mere debt or matter of contract in the ordinary understanding of the term, but rather a public burden in the nature of an obligation due from the citizen for the support of the government, and to permit a tax to be thus subjected to the doctrine of set-off would necessarily be subversive of the power of government.<sup>96</sup>

§ 559. **Effect of injunction against paying interest on municipal bonds.** A preliminary injunction granted against county officers to restrain them from paying any interest upon certain bonds or obligations of the county does not have the effect of rendering invalid a tax levied to pay the interest upon such bonds. Such an injunction will not, therefore, operate to prevent the proper officers of the county from collecting the tax already levied.<sup>97</sup>

§ 560. **Advertising for bids.** Although a city charter provides that no contracts beyond a certain sum shall be entered into by the city except with the lowest bidder, after advertising, an injunction will not lie at the suit of adjacent lot owners to restrain the enforcement of a tax for paving streets with a patented pavement which is the exclusive property of one firm.<sup>98</sup> Nor will the fact that the city authorities have not complied with their charter in ordering street improvements and in advertising for bids warrant an injunction in favor of an adjacent lot owner before any taxes have been assessed or levied, or any injuries sustained.<sup>99</sup> Where, however, an assessment is imposed for street improvements, and, in disregard of an ordinance requiring advertisement for proposals.

<sup>96</sup> *Finnegan v. City of Fernandina*, 15 Fla., 379; *Scobey v. Decatur County*, 72 Ind., 551.

<sup>97</sup> *L. L. & G. R. Co. v. Clemmans*, 14 Kan., 82.

<sup>98</sup> *Hobart v. Detroit*, 17 Mich., 246; *Harlem Gas Light Co. v. May-*

or, 33 N. Y., 309. And see dissenting opinion of Dixon, C. J., in *Dean v. Charlton*, 23 Wis., 590. But see, *contra*, *Dean v. Charlton*, 23 Wis., 590.

<sup>99</sup> *Ballard v. Appleton*, 26 Wis., 67.



in three newspapers, advertisement is had in but one, a taxpayer is entitled to relief by injunction, in the absence of any remedy by appeal from the action of the municipal authorities.<sup>1</sup>

§ 560 *a*. **Fraud as ground for relief.** Fraudulent conduct upon the part of municipal authorities whereby the property owner is deprived of substantial rights in the matter of special assessments constitutes ground for equitable relief against the enforcement of the assessment. Where, therefore, the property owner is induced by agreement with the city authorities to withdraw his objections to the confirmation of an assessment, the enforcement of the judgment of confirmation contrary to such agreement will be enjoined.<sup>2</sup>

§ 560 *b*. **Irregularities in organization of municipal corporation no ground for injunction.** Defects or irregularities in the organization of a municipal corporation constitute no ground for equitable interference against the enforcement of taxes or assessments imposed by it. The rule is founded upon the necessity of avoiding the intolerable conditions which would result if the validity of a tax could be successfully impeached upon such grounds. Where, therefore, the corporation has a *de facto* existence and the tax is otherwise a valid charge against the taxpayer and his property, the legality of the corporate organization can not thus be collaterally attacked and the relief will accordingly be denied.<sup>3</sup>

<sup>1</sup> Mayor *v.* Johnson, 62 Md., 225.      <sup>3</sup> Burnham *v.* Rogers, 167 Mo.

<sup>2</sup> Dempster *v.* Chicago, 175 Ill., 17, 66 S. W., 970.  
278, 51 N. E., 710.

## V. MUNICIPAL-AID TAXES.

- § 561. Illegal aid tax enjoined; illustrations.
- 562. Illegality of election.
- 563. Fraud and mistake.
- 564. Acquiescence of taxpayer an estoppel.
- 565. Regularity of election.
- 566. Consolidation of railroads; insolvency of company; sale of road.
- 567. Disqualification of municipal officers no ground for injunction.
- 568. Valid defense to bonds must be shown.
- 569. Injunction will not be allowed when bonds are legal; otherwise when bonds void.

§ 561. **Illegal aid tax enjoined; illustrations.** The question of municipal aid to public enterprises of various kinds, especially in the construction of railways, has given rise to frequent applications for preventive relief in equity. The general subject of the nature and extent of relief by injunction against municipal-aid subscriptions is fully discussed in another part of this treatise,<sup>1</sup> and it is only proposed here to present such principles as govern the courts in determining applications for relief by injunction against taxation imposed in furtherance of such subscriptions. And it may be asserted as a general doctrine applicable to all cases where it is sought to enjoin the levying or collection of taxes in payment of subscriptions or donations made by a municipal corporation in aid of the construction of railways, or other kindred enterprises, that in the absence of some valid and constitutional expression of the legislative power authorizing such subscription, and the necessary taxation with which to meet it, the taxpayer may properly invoke the aid of equity by injunction in his behalf.<sup>2</sup> Thus, a taxpayer may enjoin the collection

<sup>1</sup> See § 1282, *post, et seq.*

houn, 100 Ill., 392; *Hays v. Dowis*,

<sup>2</sup> *Flack v. Hughes*, 67 Ill., 384; 75 Mo., 250. But see, *contra*, *State Foster v. Kenosha*, 12 Wis., 616; *v. Parkville*, 32 Mo., 496, where it is held that the issuing of bonds Supervisors of Livingston Co. *v.* Weider, 64 Ill., 427; *Marshall v. Silliman*, 61 Ill., 218; *Rutz v. Cal-* tax, in aid of subscriptions to a

of a tax levied upon his property for the payment of interest on bonds of the township issued pursuant to a vote of the citizens in aid of a subscription to a railway company, in the absence of any law authorizing such election or vote.<sup>3</sup> And where a city attempts under a provision in its charter to levy a tax in payment of a subscription to the capital stock of a railway company, it is proper to enjoin the enforcement of the tax upon the ground that the provision of the charter under which the proceedings were had is unconstitutional, and the tax, therefore, unauthorized.<sup>4</sup> So where the legislature of the state has exceeded its authority under the constitution in attempting to authorize subscriptions by a county in aid of the location of a state reform school, and a tax has been levied by such board and collected for the payment of interest upon bonds of the county subscribed in aid of the undertaking, the county treasurer may be enjoined from applying the taxes thus collected in payment of the interest upon such bonds.<sup>5</sup> And where a township votes in favor of a subscription to a railway company in excess of the amount authorized by law to be voted, and it is sought to cure the illegality by an act of legislature attempting to legalize such election, but

railroad by a county court, will not be enjoined on the ground of want of jurisdiction in the court to take such proceeding without a vote of the people, since a sale of the taxpayer's property under such proceedings would not divest the owner of his title, and he could maintain an action at law for the property, and for damages for its detention. But it is also held in Missouri that an injunction will lie, at the suit of the state, to restrain county officers from levying a tax in payment of judgments rendered by a United States court upon municipal-aid coupons, when such officers are proceeding

in disregard of the state law in levying the tax, although they are commanded so to do by the federal court, since they must conform to the statute as to the method of imposing the tax. *State v. Hager*, 91 Mo., 452. But see *Gaines v. Springer*, 46 Ark., 502, where it is held that a state court will not enjoin the collection of a tax which is levied pursuant to a *mandamus* granted by a federal court to compel the payment of a judgment against a county.

<sup>3</sup> *Flack v. Hughes*, 67 Ill., 384.

<sup>4</sup> *Foster v. Kenosha*, 12 Wis., 616.

<sup>5</sup> *Supervisors of Livingston Co. v. Weider*, 64 Ill., 427.

the curative act itself is held to be unconstitutional, a court of equity may enjoin the collection of a tax to pay interest upon bonds of the township issued upon such void subscription.<sup>6</sup>

§ 562. **Illegality of election.** It is also a noticeable feature of the subject under consideration, that the courts are usually inclined to hold municipalities to a strict adherence to the conditions required by the law under which the municipal aid is voted, and a want of compliance with some substantial requirement of the law as regards the notice of the election or the manner of submitting the proposition to the electors will warrant relief by injunction against a tax levied in aid of such subscription.<sup>7</sup> For example, a failure to give notice, as required by law, of the holding of an election to vote upon a proposition to subscribe to the capital stock of a plank-road company, constitutes sufficient ground for enjoining the collection of a tax levied in aid of a subscription by the township to such stock.<sup>8</sup> So where a statute authorizes a municipal subscription in aid of a railway upon a vote of the citizens, but the vote is submitted by the county authorities to the people upon a proposition to appropriate an entire sum to two different railways, instead of a proposition to appropriate to each road separately, a tax levied in pursuance of such vote being regarded as illegal and void, its collection may be enjoined.<sup>9</sup> And the fact that the board of county commissioners have declared the result of the election to be in favor of the subscription does not oust the jurisdiction of equity, or pre-

<sup>6</sup> *Marshall v. Silliman*, 61 Ill., 218.

<sup>7</sup> *Bronenberg v. Commissioners of Madison Co.*, 41 Ind., 502; *Finney v. Lamb*, 54 Ind., 1; *McPike v. Pen*, 51 Mo., 63; *McDowell v. Massachusetts & S. C. Co.*, 96 N. C., 514, 2 S. E., 351; *Goforth v. Rutherford R. C. Co.*, 96 N. C., 535,

2 S. E., 361. See also *Garrigus v. Commissioners of Parke Co.*, 39 Ind., 66.

<sup>8</sup> *McPike v. Pen*, 51 Mo., 63.

<sup>9</sup> *Bronenberg v. Commissioners of Madison Co.*, 41 Ind., 502; *Finney v. Lamb*, 54 Ind., 1. See also *Garrigus v. Commissioners of Parke Co.*, 39 Ind., 66.

vent the court from inquiring into the legality and regularity of the election.<sup>10</sup>

§ 563. **Fraud and mistake.** The jurisdiction of equity by injunction in the class of cases under consideration may also be exercised upon the ground of fraud, that being a favorite ground of equitable jurisdiction. Thus, fraudulent representations made by a railway company to the electors of a township, for the purpose of inducing them to vote a tax in aid of the construction of a railroad, afford sufficient reason for enjoining the collection of the tax.<sup>11</sup> And in such case, the fact that the railway company has expended labor and money upon the construction of its road will not estop taxpayers from relief in equity upon the ground of such fraudulent representations, when the fraud was not discovered until after the work was performed.<sup>12</sup> The relief may also be allowed upon the ground of mistake; and when the question of a tax in aid of a railway has been submitted to a vote of the citizens of a town, but the tax is not voted and the judges of the election so declare, but by mistake of their clerk the vote is certified to the county authorities as in favor of the tax, its collection may be enjoined.<sup>13</sup>

§ 564. **Acquiescence of taxpayer an estoppel.** A taxpayer may, however, be estopped by his own conduct from obtaining relief by injunction against the collection of a tax levied in aid of a municipal subscription or donation. Thus, where a municipal tax is voted in aid of a railway, and the work of constructing the road is completed upon the faith of the tax thus voted, a taxpayer who has remained silent until all the benefits which would accrue to him by the construction of the road are secured will not then be permitted to enjoin the collection of the tax.<sup>14</sup>

<sup>10</sup> McDowell v. Massachusetts & S. C. Co., 96 N. C., 514, 2 S. E., 351; Goforth v. Rutherford R. C. Co., 96 N. C., 535, 2 S. E., 361.

<sup>11</sup> Sinnett v. Moles, 38 Iowa, 25.

<sup>12</sup> Id.

<sup>13</sup> Cattell v. Lowry, 45 Iowa, 478.

<sup>14</sup> Lamb v. B., C. R. & M. R. Co.,



§ 565. **Regularity of election.** An injunction has been refused against the enforcement of a tax levied for the payment of a municipal subscription in aid of the construction of a railroad bridge, when the election to take the sense of the voters had been properly held and they had voted the subscription.<sup>15</sup> And where a statute authorized the question of taxation in aid of railway enterprises to be submitted to a vote of a town, upon presentation to the trustees of the town of a petition signed by one-third of the resident taxpayers, but the bill to restrain the enforcement of the tax only alleged that no petition was signed by one-third of the taxpayers, being silent as to the question of their residence, it was held that no sufficient ground for an injunction was shown.<sup>16</sup> And in Indiana it is held that when the law authorizes the municipal aid to be given by a board of county officers, upon the petition of a given number of freeholders, the action of such board in passing upon the sufficiency of the petition can be challenged only directly by appeal, and can not be called in question collaterally in a suit to enjoin a tax levied for payment of the subscription.<sup>17</sup>

§ 566. **Consolidation of railroads; insolvency of company; sale of road.** When municipal bonds have been issued under authority conferred by statute, as a donation from a city in aid of a railway company, and have passed into the hands of innocent purchasers, equity will not enjoin a tax levied to meet the interest upon the bonds merely because of the consolidation of the railroad to which the aid was granted with another road, such consolidation being within the corporate power, and no irregularity being shown therein.<sup>18</sup> Nor will the

39 Iowa, 333. And see *Commissioners v. Hinchman*, 31 Kan., 729, 3 Pac., 504.

<sup>15</sup> *Harcourt v. Good*, 39 Tex., 455.

<sup>16</sup> *Zorger v. Township of Rapids*, 36 Iowa, 175.

<sup>17</sup> *Faris v. Reynolds*, 70 Ind.,

359; *S. C. sub nom. Reynolds v. Faris*, 80 Ind., 14; *Board of Commissioners v. Hall*, 70 Ind., 469. And see *Goddard v. Stockman*, 74 Ind., 400.

<sup>18</sup> *City of Mount Vernon v. Hovey*, 52 Ind., 563.

relief be granted because of the insolvency of the railway company and its alleged inability to complete its road.<sup>19</sup> But the writ has been granted to restrain the collection of a tax voted in aid of a railway which has transferred its property to another company, although it was known that such transfer was contemplated when the tax was voted.<sup>20</sup>

§ 567. **Disqualification of municipal officers no ground for injunction.** Upon a bill to enjoin the collection of a tax levied by municipal authorities for the payment of principal and interest upon bonds issued pursuant to legislative authority in aid of the construction of a railroad, the fact that certain members of the municipal government issuing the bonds were disqualified from holding office affords no ground for extending equitable relief; since the acts of such officers are to be regarded as those of officers *de facto*, and therefore valid and binding until their title to the office is adjudged invalid.<sup>21</sup>

§ 568. **Valid defense to bonds must be shown.** Equity will not interfere to restrain the collection of a tax for the payment of bonds issued by a city in aid of a railway, when it is not shown that the city has a valid legal defense to the bonds in the hands of the present holders.<sup>22</sup> And although the case presented might be sufficient to warrant an injunction against issuing the bonds if not already issued, it does not necessarily follow that the relief will be awarded by restraining the collection of taxes for their payment after they have been put in circulation.<sup>23</sup>

§ 569. **Injunction will not be allowed when bonds are legal; otherwise when bonds void.** Where railroad bonds have been subscribed and issued under an act of legislature which is constitutional, and the conditions of the act have been fully

<sup>19</sup> *Wilson v. Board of Commissioners*, 68 Ind., 507.

<sup>20</sup> *Blunt v. Carpenter*, 68 Iowa, 265, 26 N. W., 483.

<sup>21</sup> *Lockhart v. City of Troy*, 48 Ala., 579.

<sup>22</sup> *Wilkinson v. City of Peru*, 61 Ind., 1.

<sup>23</sup> *Id.*

complied with, and the bonds have been issued and have passed into the hands of *bona fide* holders for value, a court of equity will not enjoin the municipal authorities from raising the necessary funds by taxation for the payment of interest upon such bonds.<sup>24</sup> And when a judgment establishing the validity of the bonds has been obtained against the municipality and taxes have been levied for the payment of interest, such judgment will be held conclusive upon taxpayers, and they will not be permitted to enjoin the collection of the tax.<sup>25</sup> If, however, the bonds are totally void, as where issued by a supposed municipality which had no corporate existence either *de jure* or *de facto*, a taxpayer may restrain the enforcement of a tax levied for the purpose of paying the principal and interest of such obligations.<sup>26</sup>

<sup>24</sup> Cumines v. Supervisors, 63 Barb., 287.

<sup>26</sup> Morton v. Carlin, 51 Neb., 202, 70 N. W., 966.

<sup>25</sup> Commissioners v. Hinchman, 31 Kan., 729.

## VI. BOUNTIES.

§ 570. Bounties to soldiers unauthorized by legislature will be enjoined.

571. Statute must be strictly complied with.

572. Parties; dissolution.

§ 570. **Bounties to soldiers unauthorized by legislature will be enjoined.** A branch of the jurisdiction of equity in restraint of taxes of modern origin is that which is exercised in cases of taxation for the payment of bounties to soldiers, or for the purpose of freeing a town or city from a draft of its citizens for military service. The general rule as regards municipal taxes for such purposes is, that where the municipal authorities are proceeding without legislative sanction, an injunction will be allowed to restrain such misappropriation of the public funds.<sup>1</sup> The ground for relief in this class of cases is that the remedy at law by suit to recover back the tax paid is inadequate.<sup>2</sup> Where, however, a town is authorized by act of legislature to levy a tax for relieving its inhabitants from draft, the collection of the tax will not be enjoined, but the persons aggrieved will be left to pursue their remedy at law.<sup>3</sup> Even where a town originally had no authority to vote such a tax, if a subsequent act of the legislature has authorized it to ratify and confirm such vote, and this has been done, an injunction will not be allowed.<sup>4</sup>

§ 571. **Statute must be strictly complied with.** But, although equity will not interfere with a bounty tax authorized by act of legislature, yet the terms of the statute must be

<sup>1</sup> Webster v. Harwinton, 32 Conn., 131; New London v. Brainard, 22 Conn., 552; Fiske v. Hazard, 7 R. I., 438; Drake v. Phillips, 40 Ill., 388. But see, *contra*, Truesdell's Appeal, 58 Pa. St., 148.

<sup>2</sup> Webster v. Harwinton, 32 Conn., 131.

<sup>3</sup> Hoagland v. Delaware, 2 C. E. Green, 106.

<sup>4</sup> Baldwin v. North Branford, 32 Conn., 47; Booth v. Woodbury, *ib.*, 118. And see as to dissolution of the injunction under such a statute, Bartholomew v. Harwinton, 33 Conn., 408.

complied with in all essential points. And where a tax is voted the next day after the passage of the act authorizing it and before the requisite notice prescribed by the statute could possibly be given, such a notice being indispensable to the validity of the tax, its collection will be enjoined.<sup>5</sup> And where the quota of the town is already filled at the time of the passage of the law, and there is no reasonable probability of more soldiers being required, such a tax is unauthorized and will be restrained.<sup>6</sup> So where by the terms of a city charter the real estate and personal property of its inhabitants are exempt from taxation for county purposes, a bill in chancery lies to enjoin the collection of a bounty tax sought to be imposed by the county, even though the tax be authorized by the act of legislature.<sup>7</sup>

§ 572. **Parties; dissolution.** It is held that an illegal tax for bounty purposes will not be restrained where the complainant files the bill only in his individual behalf, and where it does not appear that he has not an adequate remedy at law, or that the proceedings will be productive of irreparable injury, or will lead to a multiplicity of suits, or a cloud upon title.<sup>8</sup> And a perpetual injunction granted against the payment of a bounty voted by a town meeting to drafted men or their substitutes may be dissolved upon the passage of an act of legislature legalizing such vote.<sup>9</sup> And in the absence of any allegation of fraud the collection of a tax in payment of a bounty for the destruction of wolves will not be restrained, where such bounty has been authorized by the legislature and by vote of the town.<sup>10</sup>

<sup>5</sup> *Vieley v. Thompson*, 44 Ill., 9.

<sup>9</sup> *Bartholomew v. Harwinton*, 33 Conn., 408.

<sup>6</sup> *Id.*

<sup>10</sup> *Mooers v. Smedley*, 6 Johns. Ch., 28.

<sup>7</sup> *Supervisors v. Campbell*, 42 Ill., 490.

<sup>8</sup> *Scribner v. Allen*, 12 Minn., 148.



## VII. PARTIES.

- § 573. General principles governing joinder of parties.  
574. Different taxpayers may unite as plaintiffs.  
575. The doctrine further discussed.  
576. Rule as to joinder of defendants.  
577. Railroad tax, different counties joined; school district; pretended corporation.  
577a. Holder of corporate bonds, secured by mortgage, when not proper party complainant.

§ 573. **General principles governing joinder of parties.** The question of who are proper parties plaintiff and defendant in an action to restrain the enforcement or collection of a tax is one of much practical importance, since in a case otherwise proper for equitable relief the court will refuse to interfere unless the proper parties are before it. It may be said, generally, that one who does not own real estate which it is sought to subject to a tax, and who is not, therefore, liable to the tax, will not be allowed the aid of an injunction to prevent its enforcement.<sup>1</sup> And an action to enjoin a tax should be brought by the taxpayers themselves who are affected by it, and a township can not maintain a bill for an injunction against the collection of taxes levied upon property of individual citizens of such township.<sup>2</sup> So an incorporated board of education can not maintain a bill to enjoin the collection of illegal taxes levied for school purposes.<sup>3</sup> Nor can a city which has no property which is subject to an illegal tax join in a bill brought by taxpayers to enjoin its collection.<sup>4</sup> So equity will not entertain an action by a municipal corporation to test the legality of a tax levied by another municipality by enjoining its collection, relief by injunction against illegal taxes being ex-

<sup>1</sup> *McMahon v. Welsh*, 11 Kan., 280.

<sup>2</sup> *Center Township v. Hunt*, 16 Kan., 430.

<sup>3</sup> *Board of Education v. Guy*, 64 Ohio St., 434, 60 N. E., 573.

<sup>4</sup> *Stiles v. City of Guthrie*, 3 Okla., 26, 41 Pac., 383.

tended only in behalf of taxpayers.<sup>5</sup> Nor can a state maintain an action to restrain the collection of a tax levied for the payment of municipal bonds, upon the ground that the bonds are illegal and *ultra vires* on the part of the municipality issuing them; since the state as such has no direct interest in the matter.<sup>6</sup> And when a tax is illegally assessed upon property beyond the boundaries of the municipality making the assessment, the state is not a proper party plaintiff to seek relief by injunction, but the taxpayers aggrieved will be left to pursue their remedy in their own behalf.<sup>7</sup> So after the death of the plaintiff in a suit brought to restrain the sale of land for taxes, his personal representative, having, as such, no interest in the subject-matter of the litigation, can not maintain the action.<sup>8</sup> The governing rule, therefore, resting alike upon principle and authority, is that the action to enjoin the collection of a tax should be brought by a taxpayer whose property and interests are directly and immediately affected by the tax which it is sought to enjoin, the same degree of interest being requisite as in all other cases where the extraordinary aid of equity by injunction is invoked.

§ 574. **Different taxpayers may unite as plaintiffs.** While there is not wanting authority to the effect that individual taxpayers whose property is separately assessed do not have such a community of interest as to render it proper to join them as complainants, even upon the ground of preventing a multiplicity of suits,<sup>9</sup> the decided weight of authority is clearly averse to this doctrine. And it may be asserted as a general rule governing the joinder of parties complainant in this class of actions, that different property owners and taxpayers, having separate and distinct interests as regards the ownership of property subjected to the burden of a common tax, but

<sup>5</sup> *Nunda v. Chrystal Lake*, 79 Ill., 311.

<sup>7</sup> *Ewing v. Board of Education*, 72 Mo., 436.

<sup>6</sup> *State v. McLaughlin*, 15 Kan., 228.

<sup>8</sup> *Driver v. Hays*, 51 Ark., 82, 9 S. W., 853.

<sup>9</sup> *Harkness v. Board of Public*

suing for themselves and all others similarly interested, may unite in an action to obtain relief by injunction against the collection of such tax; since, although their titles are several and distinct, they nevertheless have such a common interest in the subject-matter of the litigation as to render them proper co-plaintiffs in a proceeding to obtain relief from the burden common to them all.<sup>10</sup> And where an assessment or tax is affected by such illegalities as to justify a court of equity in extending preventive relief by injunction, different property holders and taxpayers who are subjected to the burden of such illegal tax may bring their action for relief in behalf of themselves and of all others similarly situated, and whose assessments remain unpaid.<sup>11</sup> So where an assessment levied for the construction of public roads is void as to all owners of property affected thereby, it is competent for different owners in severalty to join in an action for an injunction.<sup>12</sup> And

Works, 1 McArthur, 121; *Lewis v. Eshleman*, 57 Iowa, 633, 11 N. W., 617. See also *Hudson v. Commissioners of Atchison Co.*, 12 Kan., 140, where it is held that different persons holding shares of stock severally in an incorporated company, with no joint interest, can not unite in an action to enjoin the collection of an alleged illegal tax upon such shares, but must sever in the action.

<sup>10</sup> *Bristol v. Johnson*, 34 Mich., 123; *Carlton v. Newman*, 77 Me., 408, 1 Atl., 194; *Wood v. Draper*, 24 Barb., 187; S. C., 4 Ab. Pr., 322; *McClung v. Livesay*, 7 West Va., 329; *Brandirff v. Harrison Co.*, 50 Iowa, 164; *Robbins v. Sand Creek Turnpike Co.*, 34 Ind., 461; *Greencastle & Bowling Green Turnpike Co. v. Albin*, 34 Ind., 554; *Forgey v. Northern Gravel Road Co.*, 37 Ind., 118; *Kennedy v. City of Troy*,

14 Hun, 308; *Glenn v. Waddel*, 23 Ohio St., 605. See also *Scofield v. City of Lansing*, 17 Mich., 437; *Morris v. Cummings*, 91 Tex., 618, 45 S. W., 383; *Stiles v. City of Guthrie*, 3 Okla., 26, 41 Pac., 383.

<sup>11</sup> *Kennedy v. City of Troy*, 14 Hun, 308; *Wood v. Draper*, 24 Barb., 187; S. C., 4 Ab. Pr., 322; *McClung v. Livesay*, 7 West Va., 329; *Carlton v. Newman*, 77 Me., 408, 1 Atl., 194. The action should be brought by complainants as taxpayers suing for themselves and all others similarly situated, and it is held that it can not be maintained unless so brought. *Williams v. County Court*, 26 West Va., 488. But see *Supervisors of DuPage Co. v. Jenks*, 65 Ill., 275; *Bridge Company v. Commissioners of Wyandotte Co.*, 10 Kan., 326.

<sup>12</sup> *Robbins v. Sand Creek Turnpike Co.*, 34 Ind., 461; *Greencastle*

different taxpayers whose lands are illegally assessed may unite in a proceeding for an injunction, when the rights of all are dependent upon the same question.<sup>13</sup> And where a tax, if levied and extended, will be illegal and void, a single taxpayer may have relief against the entire tax. And in such case it is not necessary that the plaintiff should in express terms purport to be acting upon behalf of all other taxpayers having individual interests of the same character if such is the necessary effect of the suit.<sup>14</sup>

§ 575. **The doctrine further discussed.** Notwithstanding the general doctrine as thus stated, recognizing the right of different taxpayers affected by a common burden of illegal taxation to unite in an application for equitable relief, it is held that one taxpayer can not maintain a bill to enjoin an entire tax imposed upon other persons as well as himself, and can not maintain such an action as to other taxpayers for whom he is not acting as agent, trustee, or in some other representative capacity.<sup>15</sup> It has also been held that equity will not entertain a bill by one taxpayer to enjoin the levying of a tax against other persons not joined as plaintiffs in the suit, and that a tax will not be enjoined in behalf of one who does not himself seek to have it enjoined.<sup>16</sup> It is difficult, however, to reconcile such rulings of the courts with the doctrine of the preceding section, which has not alone the

& Bowling Green Turnpike Co. v. several. *Gilmore v. Norton*, 10 Albin, 34 Ind., 554; *Forgey v. Kan.*, 491; *Gilmore v. Fox*, 10 Kan., Northern Gravel Road Co., 37 Ind., 509.

118. See *Pendleton Co. v. Barnard*, 40 Ind., 146. <sup>14</sup> *Knopf v. First National Bank*, 173 Ill., 331, 50 N. E., 660.

<sup>13</sup> *Glenn v. Waddel*, 23 Ohio St., 605. And in Kansas it is held, under the statutes of the state, that any number of persons whose property is affected by an illegal tax or assessment may unite as plaintiffs in an action to enjoin the collection of such tax or assessment, although their interests are <sup>15</sup> *Supervisors of Du Page Co. v. Jenks*, 65 Ill., 275, distinguished and explained in *Knopf v. First National Bank*, 173 Ill., 331, 50 N. E., 660.

<sup>16</sup> *Bridge Company v. Commissioners of Wyandotte Co.*, 10 Kan., 326; *Stiles v. City of Guthrie*, 3 Okla., 26, 41 Pac., 383.

mere weight of authority in its support, but the established principles of modern equity pleading as well. For, while the ancient rules of pleading in equity required all parties desiring relief to be before the court, the modern practice, which may be said to have originated and become well established during the long chancellorship of Lord Eldon, only requires sufficient of the parties to fairly litigate the right to be before the court. And where the parties are numerous the practice in equity is well established of permitting one or more persons to file a bill in behalf of all others in like interest or similarly situated to obtain the desired relief in behalf of all; and no satisfactory reason is perceived why bills to enjoin the enforcement of taxes should constitute an exception to a doctrine so well established. It is held, however, that a private taxpayer, who suffers no especial grievance by a tax imposed, can not assume on behalf of the public to restrain the proceedings.<sup>17</sup> And the issuing of a tax deed will not be enjoined at the suit of one who fails to show any interest in the lands in question.<sup>18</sup>

§ 576. **Rule as to joinder of defendants.** Upon the question of who are proper parties defendant to an action to restrain the collection of a tax, there is less room for difficulty in practice, the bill being usually directed against the officers by whom the tax is being levied or collected. In cases of municipal taxation, as where a tax for local improvements is levied by a city, and the tax when collected will belong to the city, it should be joined as a party defendant in an action to enjoin the tax.<sup>19</sup> So in a bill to enjoin a county collector from selling real estate under a judgment for a delinquent special assessment levied by a city, where the regularity and validity of the judgment and the acts of the officials entrusted with the collection of the tax are not questioned, but the right to

<sup>17</sup> *Miller v. Grandy*, 13 Mich., 540.

<sup>18</sup> *Johnson v. Brett*, 64 Iowa, 162,  
<sup>19</sup> N. W., 895.

<sup>19</sup> *Gilmore v. Fox*, 10 Kan., 509.



the relief is based upon acts and omissions upon the part of the city authorities which invalidate the assessment, the city is a necessary party to the injunction bill and it is therefore erroneous to deny its motion to be made a party defendant.<sup>20</sup> So, also, where it is sought to enjoin the extension of a tax levied for park purposes by a board of park commissioners, the latter are necessary parties to the proceeding and it is therefore error to proceed without them.<sup>21</sup> And in a suit to restrain the city and county authorities from levying a tax for the payment of interest upon certain city bonds alleged to be invalid, the holders of the bonds are necessary parties.<sup>22</sup> And it has even been held that in a suit to enjoin a county treasurer and sheriff from enforcing a personal property tax, the board of county commissioners must be joined.<sup>23</sup> The true test, however, in all cases would seem to be to make such

<sup>20</sup> *Smith v. Kochersperger*, 173 Ill., 201, 50 N. E., 187; *Heinroth v. Kochersperger*, 173 Ill., 205, 50 N. E., 171.

<sup>21</sup> *Knopf v. Kochersperger*, 173 Ill., 331, 50 N. E., 660; *Knopf v. Chicago Real Estate Board*, 173 Ill., 196, 50 N. E., 658. In the first of these cases, the park commissioners made a motion to be admitted as parties defendant but the motion was denied by the court. Upon an appeal from a decree granting a final injunction, the court did not direct the dismissal of the bill but reversed and remanded to the lower court with leave to the complainant, upon payment of all costs, to make the park board defendants, and with instructions to that court, if this should not be done, to dismiss the bill at complainant's costs. It is believed that the rule as announced in the text should not be ex-

tended beyond the case of a single tax levy made by a single corporate taxing body and that it would not require that where an injunction is sought to restrain the collection of a general tax in which are included many items levied by numerous taxing municipalities, such taxing bodies should be joined as defendants where they are properly represented by the municipal officers entrusted with the extension or collection of the tax. In *Knopf v. Kochersperger*, *supra*, the court say: "Here was a single corporate authority attempting to exercise a power by the levy of a tax, and there was no difficulty in making the commissioners defendants. This decision is only intended to apply to such a case."

<sup>22</sup> *City of Anthony v. State*, 49 Kan., 246, 30 Pac., 488.

<sup>23</sup> *Ba Som v. Nation*, 63 Kan.,

parties defendant as are necessary to a proper solution of the questions at issue. And when it is sought to restrain the officers of a town from the collection of unpaid taxes, it is not necessary to join as defendants the officers of the county, when a complete determination of the questions involved may be had without them.<sup>24</sup>

§ 577. **Railroad tax, different counties joined; school district; pretended corporation.** When the action is brought by a railway company to enjoin the collection of a tax levied upon its lands, it is proper to join as defendants the different counties through which the railroad runs when the question upon which the case turns is common to them all.<sup>25</sup> And upon a bill brought against a county treasurer to restrain him from collecting a tax levied for the payment of a school district bond, the district is a necessary party defendant, and in such case it is error to overrule a demurrer for want of proper parties.<sup>26</sup> And when it is sought to enjoin an assessment levied for purposes of improvement by a pretended corporation, such as a drainage company, which is not legally incorporated, the action is properly brought against such assumed corporation in its corporate name as defendant.<sup>27</sup>

§ 577 *a*. **Holder of corporate bonds, secured by mortgage, when not proper party complainant.** The holder of corporate bonds secured by mortgage upon property of the corporation can not enjoin the collection of a tax assessed against the corporate property where he fails to show that he is either the mortgagee or that the legal holder of the mortgage has refused to act; and in such case the holder of the mortgage should be made a party defendant.<sup>28</sup>

247, 65 Pac., 226; *Shearer v. Murphy*, 63 Kan., 537, 66 Pac., 240.

<sup>24</sup> *Milwaukee Iron Company v. Town of Hubbard*, 29 Wis., 51.

<sup>25</sup> *Union Pacific R. Co., v. McShane*, 3 Dill., 303.

<sup>26</sup> *Hays v. Hill*, 17 Kan., 360. See

also *Voss v. Union School District*, 18 Kan., 467.

<sup>27</sup> *Newton County Drainage Company v. Nofsinger*, 43 Ind., 566.

<sup>28</sup> *Bayles v. Dunn*, 54 C. C. A., 549, 116 Fed., 185.

## CHAPTER IX.

### OF INJUNCTIONS PERTAINING TO STREETS AND HIGHWAYS.

- § 578. Taking property for road or street without compensation enjoined.
579. Statutory or legal remedy must be first exhausted.
580. Injunction allowed when legal remedy inadequate.
581. Effect of contract with property owner.
582. Injunction refused when legal tribunal has acted.
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587. Municipal control over streets rarely interfered with; changing grade of street.
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- 589a. Elevated railroad in street; hack stands.
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590. Injunction pending suit to test legal right; insolvency of defendant.
591. Apprehensions of future injury, when insufficient.
592. Opening of public highways; remedy at law.
593. Discretion of municipal authorities not interfered with.
594. Railway company in street; closing streets; vacating streets; plaintiffs must own adjacent property.
595. Exercise of franchise.
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597. Disfiguration of premises by proposed road; land acquired for specific purpose.
- 597a. Unauthorized opening or maintenance of highway enjoined.
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- 597c. Injunction against steam-roller in highway.
- 597d. Municipality may enjoin improvement contrary to ordinance.
- 597e. Injunction against total obstruction of street.
- 597f. Telegraph and telephone poles; electric light poles and wires.
- 597g. Injunction on behalf of telephone company against electric street railway.
- 597h. Injunction on behalf of electric lighting company against rival company in highway.

§ 578. **Taking property for road or street without compensation enjoined.** The preventive jurisdiction of courts of equity by the writ of injunction is frequently invoked to restrain the opening of streets and highways because of the refusal or omission of the public authorities to make proper compensation to property owners for damages incurred in taking their land for public use. And the principle is well established in cases of streets and highways, as in cases of railroads, that the failure to make or tender due compensation to the owner of land for damages incurred by taking his land for the purposes of a road or street, will justify relief by injunction at the suit of the property owner until his damages are properly adjusted, or until just compensation is made therefor.<sup>1</sup> In such cases the jurisdiction is exercised for the prevention of irreparable injury which would necessarily result from the prosecution of such public works without just compensation being first made to the property owner, the ordinary legal remedies being regarded as inadequate to afford satisfactory relief.<sup>2</sup> Where, therefore, commissioners of

<sup>1</sup> *Commissioners v. Durham*, 43 Ill., 86; *Horton v. Hoyt*, 11 Iowa, 496; *Powers v. Bears*, 12 Wis., 213; *Uren v. Walsh*, 57 Wis., 98, 14 N. W., 902; *Carbon C. & M. Co. v. Drake*, 26 Kan., 345; *Mason City S. & M. Co. v. Mason*, 23 West Va., 211; *Jarvis v. Town of Grafton*, 44 West Va., 453, 30 S. E., 178; *City of New Albany v. White*, 100 Ind., 206; *Folley v. Passaic*, 11 C. E. Green, 216; *Carpenter v. Grisham*, 59 Mo., 247; *Eidemiller v. Wyandotte City*, 2 Dill., 376; *McIntire v. Lucker*, 77 Tex., 259; 13 S. W., 1027; *Hopkins v. Cravey*, 85 Tex., 189, 19 S. W., 1067; *Olson v. City of Seattle*, 30 Wash., 687, 71 Pac., 201. Upon the same principle, a municipality may be enjoined

from opening a ditch over plaintiff's property without condemnation and compensation. *Strohl v. Borough of Ephrata*, 178 Pa. St., 50, 35 Atl., 713. In *Fulton v. Town of Dover*, 6 Del. Ch., 1, 6 Atl., 633, it was held that a property owner may enjoin the taking of a portion of his property by a municipality for the purposes of a highway because of the failure of the authorities to comply with the terms of a statute which provided that upon the condemnation of any land for the purpose of a highway, immediate notice thereof should be given to the owner.

<sup>2</sup> *Commissioners v. Durham*, 43 Ill., 86. And see *Sidener v. Norristown*, 23 Ind., 623.

highways are proceeding to open a road without having adjusted the damages with the owner of land over which it is proposed to locate the road, an injunction will be granted to restrain their proceedings.<sup>3</sup> And where a municipal corporation, under claim and color of right, enters upon and takes private property for public uses, giving the owner a grossly inadequate compensation for the damages incurred, if the steps taken are regular in form so that the illegality does not appear on the face of the proceedings themselves, an injunction will be granted, the common law remedy by *certiorari* being insufficient.<sup>4</sup> So where, under the constitution of the state, payment of compensation to the land owner, or a deposit of the requisite amount must be made before his property can be appropriated to the use of any corporation, a court of equity will enjoin the taking possession of such property for the purpose of a public road before making the payment or deposit. And the injunction may be allowed, in such case, pending an appeal by the land owner from the award of damages for the land taken.<sup>5</sup> So when a board of county supervisors in constructing a highway have encroached upon plaintiff's land by building an embankment thereon, without his consent and without making compensation, they may be required by mandatory injunction, upon the final hearing, to remove such embankment.<sup>6</sup>

§ 579. **Statutory or legal remedy must be first exhausted.** The general doctrine as above stated is to be accepted with this qualification: that where a statutory remedy is provided for obtaining damages for private property taken in the construction of roads, or for the relief of such persons as consider themselves aggrieved in the assessment of damages for their property taken, such statutory remedy must be first exhausted be-

<sup>3</sup> *Commissioners v. Durham*, 43 Ill., 86.

<sup>4</sup> *Baldwin v. Buffalo*, 29 Barb., 396.

<sup>5</sup> *Eidemiller v. Wyandotte City*, 2 Dill., 376.

<sup>6</sup> *Harrison v. Board of Supervisors*, 51 Wis., 645, 8 N. W., 731.



fore equity will extend its protection.<sup>7</sup> Thus, where a statute provides a mode of obtaining damages for property taken for the use and construction of a road, but the owner of the land has neglected to avail himself of the mode of relief thus pointed out, he will not be allowed to enjoin the construction of the road because of the non-payment of damages.<sup>8</sup> And the owner of land through which a city has laid out a street, and who is dissatisfied with the assessment of damages, but has failed to avail himself of a legal remedy provided by statute, is not entitled to an injunction against the city authorities to prevent their entering upon his land.<sup>9</sup> So where the grounds relied upon for an injunction to restrain the opening of a highway are irregularities in the statutory proceedings for opening such highway and the rejection of plaintiff's claim for damages, equity will not interfere by injunction when plaintiff may have full relief by appeal or writ of error.<sup>10</sup>

§ 580. **Injunction allowed when legal remedy inadequate.** Where the legal remedy is plainly insufficient to meet the requirements of the case and to avert the threatened injury, equity will not compel the person aggrieved to await the tardy action of the ordinary tribunals. Thus, where the power of taxation of a municipal corporation is so inadequate that compensation can not, within a reasonable time, be made to the owner of private property for damages resulting to him by laying out a street through his property, the opening of the street will be enjoined until security is given for all damages which may be incurred.<sup>11</sup>

§ 581. **Effect of contract with property owner.** Where, however, a lot owner in a city has entered into an agree-

<sup>7</sup> *Nichols v. Salem*, 14 Gray, 490;  
*Reckner v. Warner*, 22 Ohio St.,  
 275. And see *Parham v. Justices*,  
 9 Ga., 341.

<sup>8</sup> *Reckner v. Warner*, 22 Ohio St.,  
 275.

<sup>9</sup> *Nichols v. Salem*, 14 Gray, 490.  
<sup>10</sup> *Frevort v. Finfrock*, 31 Ohio  
 St. 621. And see *McClelland v. Mil-*  
*ler*, 28 Ohio St., 488.

<sup>11</sup> *Keene v. Bristol*, 26 Pa. St.,  
 46.

ment with the city authorities for the sale of his premises at a given price, and the city is proceeding to prepare the lot for use as a public highway, he can not enjoin them from so doing upon the ground that the damages for taking his property have not been paid; since if he claims that the sale to the city is void, his remedy is by ejectment; otherwise, by an action to recover the purchase money under the agreement of sale.<sup>12</sup>

**§ 582. Injunction refused when legal tribunal has acted.**

Equity will not enjoin a turnpike company from operating its road over complainant's premises upon the ground that insufficient damages have been assessed for the right of way, when the assessment has been made in the manner prescribed by statute, and no fraud or misconduct is charged against the persons making it, and when no appeal has been prosecuted from their decision. In such case the court will presume that the action of the persons designated by law to make the assessment is correct, and will regard it as conclusive so long as it remains in force and unreversed.<sup>13</sup> Nor will the opening of a highway over plaintiff's land be enjoined upon the ground that the damages awarded him are inadequate, when he has neglected to avail himself of the statutory remedy by appeal from the award.<sup>14</sup> So when the right of a land owner to compensation for his land taken in the construction of a highway has been passed upon by a board of municipal officers designated and empowered by law for that purpose and decided adversely to the owner, he can not enjoin the taking of the land because of want of compensation, since the action of the legal tribunal authorized to determine the question of compensation will not be thus avoided collaterally in equity.<sup>15</sup>

<sup>12</sup> *Hammerslough v. City of Kansas*, 57 Mo., 219.

<sup>14</sup> *Hopkins v. Keller*, 16 Neb., 569, 20 N. W., 874.

<sup>13</sup> *Norristown Turnpike Co. v. Burket*, 26 Ind., 53.

<sup>15</sup> *Masters v. McHolland*, 12 Kan., 17.

§ 583. **Effect of pending appeal; failure to award damages to railway.** When a city has instituted proceedings to condemn property of a railway company for the use of a projected street across the railway, and an award of damages has been made, but an appeal has been taken by the company from such award, the pendency of the appeal having the effect under the laws of the state of vacating the assessment of damages, the city may be enjoined, pending the appeal, from taking possession of the property in question.<sup>16</sup> But a railway company will not be allowed to enjoin the opening of a highway across its road upon the ground that the commissioners appointed for that purpose have assessed no damages in favor of the company on account of such crossing, when the statute affords an adequate remedy by appeal from the action of the commissioners.<sup>17</sup>

§ 584. **Removal of fences; quarrying stone.** It is also held that when a municipal corporation threatens to remove plaintiff's fences as an alleged encroachment upon a street, plaintiff having for thirty years been in the undisturbed possession of the premises, the city having used no portion thereof for a street, and offering no compensation to plaintiff and no means of adjusting his compensation for the property to be taken, an appropriate case is presented for relief by injunction.<sup>18</sup> So a property owner may enjoin the municipal authorities from proceeding upon his land and tearing down fences and removing trees upon the alleged ground that a portion of the land is a part of the public highway.<sup>19</sup> And the owner of a lot abutting upon a public street, who owns the fee in the street subject to the public easement, may restrain the unauthorized quarrying and

<sup>16</sup> *City of Kansas v. Kansas Pacific R. Co.*, 18 Kan., 331. See also *Blackshire v. Atchison, T. & S. F. R. Co.*, 13 Kan., 514.

<sup>17</sup> *Chicago & A. R. Co. v. Maddox*, 92 Mo., 469, 4 S. W., 417.

<sup>18</sup> *Shields v. Mayor of Savannah*, 55 Ga., 150. See also *Bingham v. City of Walla Walla*, 3 Wash., 68, 13 Pac., 408.

<sup>19</sup> *Village of Itasca v. Schroeder*, 182 Ill., 192, 55 N. E., 50.

removal of stone from the street in front of his premises which constitutes the chief value of the land.<sup>20</sup>

§ 585. **Effect of tender of damages.** The question of a tender of the damages incurred in the opening of highways may have considerable weight in determining whether the injunction shall be permitted, and an actual tender of damages may be sufficient to bar the person aggrieved from relief in equity. Thus, where all the proceedings required by law for the opening of a public highway have been fully complied with, and damages for the land condemned have been properly assessed and tendered the owner, who refuses them, he will not be allowed to enjoin an officer from opening the highway.<sup>21</sup> But if damages for the land appropriated be not tendered the owner or his agent, he may properly enjoin proceedings for the opening of the road.<sup>22</sup>

§ 586. **Duration of injunction; irreparable injury must be shown.** The object of an injunction in the class of cases under consideration being the protection of the property owner from such loss and injury as would result from taking his property without just compensation, it will be enforced only so long as may be necessary to secure this end. And where a bill is filed to restrain county authorities from opening a highway upon the ground that they have not assessed the damages to property holders or provided for the payment thereof as required by law, the officers will be enjoined only until such time as they shall have complied with the requirements of the law and made suitable provisions for damages incurred; and it is error in such case to make the injunction perpetual.<sup>23</sup> And in the absence of any allegations of irreparable injury an injunction will not be granted against the construction of streets

<sup>20</sup> *Althen v. Kelly*, 32 Minn., 280,  
20 N. W., 188.

<sup>22</sup> *Curran v. Shattuck*, 24 Cal.,  
427.

<sup>21</sup> *Creanor v. Nelson*, 23 Cal., 464.

<sup>23</sup> *Champion v. Sessions*, 2 Nev.,  
271.

or roads, since without such injury no sufficient reason exists for seeking redress in an equitable rather than a legal forum.<sup>24</sup>

§ 587. **Municipal control over streets rarely interfered with; changing grade of street.** The jurisdiction of equity in restraint of the action of municipal corporations in regulating streets and highways is exercised with much caution, and is not regarded as a favorite jurisdiction with the courts. In the absence of allegations of irreparable injury, equity will hesitate to interfere when the effect of an injunction would be to review the action of such inferior political tribunals, and thus practically constitute a court of equity a court of errors to sit in review of the proceedings of other tribunals. And with the control of matters resting largely in the discretion of municipal authorities equity will not ordinarily interfere. Thus, a municipal corporation will not be enjoined in the exercise of its control over the regulation of streets and the laying down of curbstones on a proposed line where no irreparable injury is shown as likely to ensue, the sole equity of the bill resting in the fact that the curbstones are not being established on the true line. Nor will the fact that such action of the city authorities may involve some expense to complainant and lessen the value of his property affords sufficient ground to warrant a departure from the rule and authorize an injunction against the proceedings.<sup>25</sup> Nor can a street railway company enjoin the enforcement by the city authorities of an ordinance requiring it to remove its tracks from the side to the center of the highway, where such ordinance is merely the exercise by the city of its right to make reasonable regulations for the use of the street, and the plaintiff's franchise has been granted subject to that right.<sup>26</sup> Nor will the municipal authorities be re-

<sup>24</sup> *Holmes v. Jersey City*, 1 Beas., 299.

<sup>26</sup> *Macon C. S. R. Co. v. Mayor*, 112 Ga., 782, 38 S. E., 60.

<sup>25</sup> *Id.*



strained from preventing plaintiff from laying gas pipes in a public street, under an ordinance granted for that purpose, where it is not clear that plaintiff has fulfilled the conditions and requirements of the ordinance.<sup>27</sup> So a street railway company can not enjoin the municipal authorities from removing tracks laid in the highway under an ordinance for that purpose, where plaintiff has wholly failed to comply with the requirements of the ordinance as to the manner in which the tracks shall be laid.<sup>28</sup> So a railway company can not enjoin a city from constructing a street at grade across the tracks of the company, the city having full power so to do.<sup>29</sup> The rule is well established, however, that equity may enjoin a municipal corporation from changing the established grade of a street, to the serious injury of a lot owner, without having ascertained and paid his damages in the manner provided by law.<sup>30</sup> And where the fee to the street is in the abutting owner and where, at the time of the opening of the highway, certain shade trees located upon it were allowed to remain, the municipal authorities may be restrained from subsequently removing such trees in the absence of some public necessity for so doing.<sup>31</sup>

§ 588. **The same.** An injunction will not be allowed to prevent the authorities of a city from exercising their control over the opening or widening of public streets or high-

<sup>27</sup> Chicago Municipal G. L. & F. Co. v. Town of Lake, 130 Ill., 42, 22 N. E., 616.

<sup>28</sup> Spokane St. Ry. Co. v. City of Spokane Falls, 46 Fed., 322.

<sup>29</sup> New York & N. E. R. Co. v. City of Boston, 127 Mass., 229.

<sup>30</sup> McElroy v. Kansas City, 21 Fed., 257; Wilkin v. City of St. Paul, 33 Minn., 181, 22 N. W., 249; Brown v. City of Seattle, 5 Wash., 35, 31 Pac., 313, 32 Pac., 214, 18 L. R. A., 161; Searle v. City of Lead,

10 S. Dak., 312, 73 N. W., 101, 39 L. R. A., 345. But see, *contra*, Moore v. City of Atlanta, 70 Ga., 611, where it is held that, although a property owner abutting upon a street may be entitled to recover damages for injuries sustained by a change in the grade of the street, he can not enjoin the city from making such change until his damages are paid.

<sup>31</sup> City of Atlanta v. Holliday, 96 Ga., 546, 23 S. E., 509.

ways, or from interfering therewith at the suit of one whose only right is based on twenty years adverse user and possession, and in the absence of other equities such adverse possession will not warrant relief.<sup>32</sup> Nor will equity interpose to prevent the commission of alleged torts or trespasses which consist simply in such acts as are incident to the widening of a street and the removal of a portion of a sidewalk under proper authority, but will leave the parties to such redress as is afforded by the ordinary legal tribunals.<sup>33</sup>

§ 589. **Laying railway tracks in streets.** The use of streets for purposes unauthorized by the dedication of the land to the public, or by the law under which the dedication was made, may be enjoined where special injury is shown to result to the adjacent property owner owning the fee in the street subject to the public easement. Thus, the laying of the track of a railway company over land which has been dedicated to the public use for streets, being unauthorized by the dedication, will be enjoined when no compensation has been made to the property owner, and when there is serious doubt as to the authority of the railway company

<sup>32</sup> *Cross v. Mayor*, 3 C. E. Green, 305; *Taintor v. Mayor*, 4 C. E. Green 46. This was a bill for an injunction against the mayor and corporate authorities of the city of Morristown to restrain the removal of trees, fences and shrubbery in widening a street upon which complainant had encroached. Complainant relied, among other points, upon possession for a period of more than twenty years. Zabriskie, Chancellor, in passing upon the case, says: "The possession for over twenty years can avail the complainant nothing. It is well settled that time does not run against the state, or the public, by analogy to the statute of

limitations against individuals, but only where the state or public are expressly included. This is a wise and wholesome principle that I feel no inclination to disregard or to narrow. To protect highways from encroachments that it is the business of no one to resist, requires that the public be allowed to resume its rights at any distance of time, disregarding any loss to those who have appropriated and erected improvements on the public domain, or to the more innocent purchasers from them."

<sup>33</sup> *Cross v. Mayor*, 3 C. E. Green, 305. See also *Sims v. City of Frankfort*, 79 Ind., 446.

to proceed. And in such case the injunction will be granted at the suit of the owner of the fee, on the ground that the use of the streets for such unauthorized purpose is a special injury to him.<sup>34</sup> So an injunction will be granted at the suit of adjacent property owners, sustaining a special and peculiar injury, to restrain the laying of a street railway through streets in front of their premises without legal authority from the common council of the city.<sup>35</sup> And the construction of a third track of a street railway in a public highway, under a municipal grant, which would result in an unreasonable obstruction of the street may be restrained at the suit of an abutter whose means of access to his property would thereby be unnecessarily impaired; and the relief is granted regardless of the ownership of the fee.<sup>36</sup> So the unauthorized laying of a switch track of a railroad in a public highway contrary to the requirements of the ordinance under which the road was being constructed, whereby the right of ingress and egress to adjacent property is practically destroyed, constitutes ground for equitable relief upon behalf of the abutting owner who suffers special damage from such obstruction.<sup>37</sup> But where the charter of a street railway authorizes the construction of its tracks through the streets of a city, it is not regarded as in violation of the provision of the constitution prohibiting the taking of private property without compensation, and an injunction will not be allowed. Such a provision in a charter is regarded rather as promoting the legitimate use of the highway and the exercise of the public right of travel, and not as the taking of private property without compensa-

<sup>34</sup> *Schurmeier v. St. Paul & P. R. Co.*, 10 Minn., 82; *Street Railway v. Cummins*, 14 Ohio St., 523; *Inter-Country S. R. Co.*, 167 Pa. St., 120, 31 Atl., 476.

*Railway Co. v. Lawrence* 38 Ohio St., 41. <sup>36</sup> *Dooly Block v. S. L. R. T. Co.*, 9 Utah, 31, 33 Pac., 229, 24 L. R. A., 610.

<sup>35</sup> *Wetmore v. Story*, 22 Barb., 414; *S. C.*, 3 Ab. Pr., 262; *Thomas Eisert*, 127 Ind., 156, 26 N. E., 759.

tion.<sup>38</sup> And where the fee to the highway is in the municipality, the construction of a railroad or street railway track, under competent legislative or municipal authority, there being no actual taking of the property of the abutting owner, does not constitute the taking of private property without compensation within the meaning of such a constitutional provision, and the abutter can therefore not enjoin such construction but will be left to pursue his legal remedy for such consequential damages as he may have sustained.<sup>39</sup> But a property owner abutting upon a street may restrain the operation through the street in front of his premises of a street railway for private purposes, the company being authorized under its charter to operate its road for the benefit of the public only, and the city having no power to authorize the construction and operation of the road through the streets for private purposes.<sup>40</sup> So, also, where it is beyond the power of a city council to grant to a private individual the right to operate a railroad in a public highway for purely private purposes, the construction of such a road will be enjoined at the instance of an abutting owner.<sup>41</sup> And the relief is granted in such a case whether the fee to the street is in the abutter or in the municipality, the injury resulting from the nuisance being the same in either case.<sup>42</sup> And one who owns lands abutting on both sides of a street, owning also the fee of the street subject to the public easement, is not by reason of such ownership entitled to con-

<sup>38</sup> *Hinchman v. Paterson* H. R. Co., 2 C. E. Green, 75.

<sup>39</sup> *Osborne v. Missouri Pacific* Co., 147 U. S., 248, 13 Sup. Ct. Rep., 299; *O'Brien v. Baltimore* B. R. Co., 74 Md., 363, 22 Atl., 141, 13 L. R. A., 126; *Garrett v. L. R. E. Co.*, 79 Md., 277, 29 Atl., 830, 24 L. R. A., 396; *Poole v. Falls* R. E. R. Co., 88 Md., 533, 41 Atl., 1069.

<sup>40</sup> *Mayor v. Harris*, 73 Ga., 478; S. C., 75 Ga., 761.

<sup>41</sup> *Glaessner v. A.-B. B. Assn.*, 100 Mo., 508, 13 S. W., 707; *Gustafson v. Hamm*, 56 Minn., 334, 57 N. W., 1054, 22 L. R. A., 565; *Richi v. Chattanooga Brewing Co.*, 105 Tenn., 651, 58 S. W., 646.

<sup>42</sup> *Gustafson v. Hamm*, 56 Minn., 334, 57 N. W., 1054, 22 L. R. A., 565.

struct and operate railway tracks across the street, and can not enjoin the municipal authorities from removing such tracks, their use being inconsistent with the public use. And in such case, the municipal officers being authorized under the laws of the state to remove the obstruction, an injunction will not be granted upon an information by the attorney-general.<sup>43</sup> And the owner of a lot abutting upon a public street can not enjoin the construction and operation of a railway through the street when he sustains no injury different from that sustained by the public at large.<sup>44</sup> But a municipal corporation which is charged by law with the duty of maintaining the public streets may enjoin the unauthorized construction of a street railway in its streets.<sup>45</sup>

§ 589 *a*. **Elevated railroad in street; hack stands.** The owner of property which abuts upon a public highway, the fee of which is in the municipality, can not enjoin the construction of an elevated railroad upon the highway in front of his premises upon the alleged ground that the ordinance under which the road is being constructed is illegal, as for want of the necessary frontage consent required by law. The use of the street for such a purpose constitutes no new or additional burden, and, since the fee is in the municipality, the adjacent property suffers a consequential injury merely, for which ample redress may be had in a court of law; and the abutter will accordingly be left to the pursuit of his legal remedy for whatever damage he may have sustained.<sup>46</sup> Upon similar principles, a railroad com-

<sup>43</sup> *Bay State Brick Co. v. Foster*, 115 Mass., 431.

<sup>44</sup> *Crowley v. Davis*, 63 Cal., 460; *Decker v. E., S. & N. R. Co.*, 132 Ind., 493, 33 N. E., 349; *Gundlach v. Hamm*, 62 Minn., 42, 64 N. W., 50.

<sup>45</sup> *Borough of Stamford v. Stamford H. R. Co.*, 56 Conn., 381, 15 Atl. 749.

<sup>46</sup> *Doane v. Lake Street El. R. Co.*, 165 Ill., 510, 46 N. E., 520, 36 L. R. A., 97, 56 Am. St. Rep., 265, followed by *Blodgett v. Northwestern El. R. Co.*, 26 C. C. A., 21, 80 Fed., 601. In New York, where it is held that neither the legislature nor the municipality has the power to authorize the construction of an elevated railroad upon a pub-



pany which owns property abutting upon a public highway can not enjoin the maintenance of hack stands in the street adjacent to its property under an alleged illegal ordinance since the proper remedy is an action at law for the damage sustained. Nor can the plaintiff resort to equity in such case for the protection of the public interests involved since such wrongs are to be redressed by the proper public authorities.<sup>47</sup>

§ 589 *b*. **Electric railroad in street; the rule in New York.**

The operation of street railways by means of the modern system of overhead trolley wires, which has superseded practically all other means of street railway locomotion, constitutes no new or additional burden upon the highway but is held to be a legitimate and proper use within the contemplation of the original dedication, and the abutting owner can therefore not enjoin the operation of such a road in the highway adjacent to his premises. Whether the fee be in the municipality or in the abutter, the original dedication must be held to have contemplated new and improved methods of transportation, and so long as the new system does not interfere unreasonably with the use of the street by the adjacent owner or by the public generally, no case is presented for equitable relief.<sup>48</sup> So where a street railway com-

lie highway without compensation to the abutting owner for the injury to his easement, the prevailing practice is to grant a perpetual injunction against the construction or maintenance of the elevated structure, unless the defendant shall pay the amount of the damage sustained. *Pappenheim v. M. El. R. Co.*, 128 N. Y., 436, 28 N. E., 518, 13 L. R. A., 401; *American Bank-Note Co. v. N. Y. El. R. Co.*, 129 N. Y., 252, 29 N. E., 302, 50 Am. & Eng. R. Cas., 298; *Hughes v. M. El. R. Co.*, 130 N. Y., 14, 25 N. E.,

765; *Thompson v. Manhattan R. Co.*, 130 N. Y., 360, 29 N. E., 264; *McGean v. M. El. R. Co.*, 133 N. Y., 9, 30 N. E., 647; *Woolsey v. N. Y. El. R. Co.*, 134 N. Y., 323, 30 N. E., 387.

<sup>47</sup> *Pennsylvania Co. v. City of Chicago*, 181 Ill., 289, 54 N. E., 825, 53 L. R. A., 223.

<sup>48</sup> *Taylor v. P. K. & Y. R. Co.*, 91 Me., 193, 39 Atl., 560, 64 Am. St. Rep., 216; *Howe v. West End R. Co.*, 167 Mass., 46, 44 N. E., 386; *Poole v. Falls R. E. R. Co.*, 88 Md., 533, 41 Atl., 1069; *Placke v. Union*

pany, being the owner of its right of way, has granted to a city an easement consisting of a right of way along a portion of such land, an injunction will not lie to restrain another company, acting under an ordinance from the city, from operating an electric street railway upon such right of way without compensation, since such a use does not constitute a new or additional servitude and, being a proper enjoyment of the public easement, is not a taking of private property for which compensation may be demanded.<sup>49</sup> But in New York, it is held, contrary to the otherwise unanimous rulings of the courts, that the construction of an electric street railway upon a public highway is a new use and imposes an additional servitude and that the lot owner who owns the fee to the center of the street subject to the public easement may therefore enjoin the construction of such a road until compensation has been made him.<sup>50</sup> In the case, however, of an interurban electric railway which runs cars at great speed upon raised rails and having for its object the carrying of freight as well as passengers, the operation of such a line constitutes an additional use of the street and may be enjoined at the suit of the abutting owner in whom is the fee to the highway until proper compensation is made.<sup>51</sup>

§ 589 c. **Frontage consent.** As regards the right to equitable relief against the construction of a street railway or of a steam or elevated railroad in a public highway upon the ground that the ordinance under which the work is proceeding was not based upon the necessary frontage consent as required by law, the authorities are not harmonious. The better doctrine undoubtedly is that so long as the use itself to which the street is to be subjected is a proper one

D. R. Co., 140 Mo., 634, 41 S. W., 915.

<sup>50</sup> *Peck v. Schenectady R. Co.*, 170 N. Y., 298, 63 N. E., 357.

<sup>49</sup> *Birmingham T. Co. v. Birmingham R. & E. Co.*, 119 Ala., 137, 24 So., 502, 43 L. R. A., 233.

<sup>51</sup> *Schaaf v. C., M. & S. R. Co.*, 66 Ohio St., 215, 64 N. E., 145.

within the contemplation of the original dedication, and the work is proceeding under color of an apparently valid ordinance, the question of the right thus to occupy the highway, it subsequently appearing that the necessary frontage consent had never been obtained, is one which can be raised only by the municipality entrusted with the control of the highway in a direct proceeding brought for that purpose, and the individual property owner will be left to the pursuit of his legal remedy for such damages as he may have sustained.<sup>52</sup> Upon the other hand, it has been held that the abutting owner is entitled to relief for want of the necessary frontage consent, where it is shown that the pro-

<sup>52</sup> *Doane v. Lake Street El. R. Co.*, 165 Ill., 510, 46 N. E., 520, 36 L. R. A., 97, 56 Am. St. Rep., 265, followed by *Blodgett v. Northwestern El. R. Co.*, 26 C. C. A., 21, 80 Fed., 601, and by *Atchison, T. & S. F. R. Co. v. General Electric R. Co.*, 50 C. C. A., 424, 112 Fed., 689; *General Electric R. Co. v. C. & W. I. R. Co.*, 184 Ill., 588, 56 N. E., 963; *Coffeen v. Chicago, M. & St. P. R. Co.*, 28 C. C. A., 274, 84 Fed., 46. To the same effect, see *McWethy v. A. E. L. Co.*, 202 Ill., 218, 67 N. E., 9. *Contra*, *Beeson v. City of Chicago*, 75 Fed., 880. In the *Doane* case, *supra*, decided in 1897, Mr. Justice Wilkin uses the following language: "It is insisted on behalf of the complainant, that on the facts set up in his bill the ordinance must be treated as passed without the required consent of abutting owners, and therefore illegal and void, which being true, the defendant should be held as proceeding with the work without any authority of law whatever, whereas in the cases referred to

lawful consent of the city was shown. The real ground upon which relief by injunction is denied in such cases is, that the use of the street being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally, the individual being left to his action for damages for any injury resulting to his property. He has no standing in equity on account of public injury or for the purpose of inflicting punishment upon the defendant for its wrongful acts. He can only invoke that jurisdiction in order to protect his property from threatened injury. His injury is a depreciation of the property, which is capable of being estimated in money and recoverable in an action at law, therefore a court of equity will not interfere by injunction."

posed work will result in irreparable injury for which there can be no adequate redress in an action at law.<sup>53</sup>

§ 590. **Injunction pending suit to test legal right; insolvency of defendant.** Where an action at law is pending for the purpose of testing the legal right of opening a highway, an injunction may be allowed to restrain its opening pending the trial of right.<sup>54</sup> And if the injury resulting from the road which it is sought to restrain is likely to prove irreparable in its nature, and if it is not susceptible of adequate compensation in pecuniary damages, a proper case is presented to warrant the interference of equity. Upon similar grounds of the inadequacy of the remedy at law, an injunction may be allowed upon allegations of defendant's insolvency, since such insolvency would render futile any attempt to recover pecuniary damages for the loss incurred.<sup>55</sup>

§ 591. **Apprehensions of future injury, when insufficient.** It is frequently a matter of difficulty to determine how far the work contemplated must have proceeded before a court of equity may be properly called upon to interfere. It would seem, however, that apprehensions of future injury, even though orders may have been given for the preliminary steps toward the construction of a road, do not constitute sufficient ground for interference. Thus, the presenting of a petition to the commissioners of highways for a private road and an expressed determination on their part, by ordering a survey of the road, to grant the petition, will not authorize a court of equity to enjoin the proceedings.<sup>56</sup>

§ 592. **Opening of public highways; remedy at law.** When defendants, the road commissioners of a town, acting as public officers under an unfounded claim of authority,

<sup>53</sup> *General Electric Co. v. C. & L. R. Co.*, 39 C. C. A., 345, 98 Fed., 478.

907, 58 L. R. A., 231.

<sup>55</sup> *Champion v. Sessions*, 1 Nev.,

<sup>56</sup> *Winkler v. Winkler*, 40 Ill.,

<sup>54</sup> *Champlin v. Morgan*, 18 Ill., 179.

are endeavoring to appropriate complainant's land to the use of the public for a highway, they may be enjoined from entering upon the land and from removing trees, buildings and fences therefrom. And in such case, the court having properly acquired jurisdiction for the purposes of the injunction may, in order to prevent a multiplicity of suits and to do complete justice between the parties, under the prayer for general relief, award damages for the injuries already committed.<sup>57</sup> And a property owner may enjoin municipal authorities from opening a road through his premises under proceedings which have been judicially determined to be illegal.<sup>58</sup> So where an order of a board of highway commissioners in laying out a highway is void for want of jurisdiction because of a failure to give the notice required by law, the giving of such notice being treated as a jurisdictional matter, a court of equity may enjoin further proceedings for the opening of the highway.<sup>59</sup> But where a land owner has joined in a petition to the proper authorities for the opening of a highway, his failure to receive notice of the proceedings will not warrant an injunction in behalf of his grantees.<sup>60</sup> Where, however, the law affords a plain and adequate remedy for persons aggrieved by the action of highway commissioners in the opening of a public highway, one who stands by and without objection or complaint suffers the proceedings to go on in the mode provided by law will not be allowed relief by injunction.<sup>61</sup> So the extension of a highway across plain-

<sup>57</sup> *Winslow v. Nayson*, 113 Mass., 411.

<sup>58</sup> *Rose v. Garrett*, 91 Mo., 65, 3 S. W., 828.

<sup>59</sup> *Frizell v. Rogers*, 82 Ill., 109; *Adams v. Harrington*, 114 Ind., 66, 14 N. E., 603.

<sup>60</sup> *Graham v. Flynn*, 21 Neb., 229, 31 N. W., 742. And in Indiana it is held that an injunction will not

lie to prevent the opening of a highway upon the ground of irregularity in the proceedings of the highway commissioners, unless the proceedings are so defective as to amount to a nullity. *McDonald v. Payne*, 114 Ind., 359, 16 N. E., 795.

<sup>61</sup> *Sparling v. Dwenger*, 60 Ind., 72. See also *Sunderland v. Martin*, 113 Ind., 411, 15 N. E., 689.



tiff's land will not be enjoined where he has a plain and adequate remedy at law by *certiorari*.<sup>62</sup>

§ 593. **Discretion of municipal authorities not interfered with.** Courts of equity are averse to interfering with the exercise of the discretion or judgment of public officers in matters committed to their care, and where municipal or town authorities are charged by law with the care of highways, and are empowered to remove obstructions therefrom, equity will not pass in review upon their judgment as to what constitutes an obstruction. Where, therefore, such officers are about to remove a private railroad track which has been laid across a highway by a manufacturing corporation, they will not be enjoined from such removal.<sup>63</sup>

§ 594. **Railway company in street; closing streets; vacating streets; plaintiff must own adjacent property.** It is also held that where the fee of the streets is in a city, and the common council have granted to a railway company a right to construct their tracks therein, equity will not, at the suit of a private citizen abutting on the street, enjoin the operation of the railroad in a given street because of an excess of authority in the use of that street, but will leave the injury to be redressed by the public authority.<sup>64</sup> Nor will a court of equity, at the suit of a citizen who shows no special injury to himself different from or other than the general injury to the public, enjoin the temporary closing up of certain streets in a city which have never been used, and which are not susceptible of being used by reason of their never having been improved.<sup>65</sup> So a private property owner, owning property which abuts on a public street at a considerable distance from a point where it is proposed by the city authorities to vacate the

<sup>62</sup> Rockwell v. Bowers, 88 Iowa, 88, 55 N. W., 1.

<sup>64</sup> Patterson v. Chicago, D. & V. R. Co., 75 Ill., 588.

<sup>63</sup> Bay State Brick Company v. Foster, 115 Mass., 431.

<sup>65</sup> Prince v. McCoy, 40 Iowa, 533.

street, can not maintain an action to enjoin such vacation, when he shows no special injury which will be sustained by himself as distinguished from the general injury to the public.<sup>66</sup> Nor will the fact that the purpose of the proposed vacation of the street is to devote it to railroad uses warrant relief by injunction in such case.<sup>67</sup> And the fact that such property owner has paid assessments for improving the street gives him no such property right therein as to entitle him to relief in equity against its vacation.<sup>68</sup> Nor will the vacation of a highway be enjoined where the property owner has an adequate remedy at law by *certiorari*.<sup>69</sup> But a municipal corporation which has no power to vacate highways may be enjoined from so doing at the suit of an abutting owner who will suffer special damage different in kind from that inflicted upon the public generally.<sup>70</sup> And the proper public officers may enjoin the vacation of a street for purely private purposes, and the relief will be granted irrespective of the question of pecuniary damage.<sup>71</sup>

§ 595. **Exercise of franchise.** In conformity with the general principle that equity will not interfere where there is ample remedy at law, an injunction will not be allowed against the exercise of the franchise of a road on grounds which should be urged at law. Thus, where a statute gives

<sup>66</sup> *City of Chicago v. Union Building Association*, 102 Ill., 379; *McGee's Appeal*, 114 Pa. St., 470, 8 Atl., 237. And in *Parker v. Catholic Bishop*, 146 Ill., 158, 34 N. E., 443, the same principle was applied in the case of the vacation of an alley. And see also *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan., 625. And see, *post*, §§ 757, 1301.

<sup>67</sup> *McGee's Appeal*, 114 Pa. St., 470, 8 Atl., 237.

<sup>68</sup> *City of Chicago v. Union Building Association*, 102 Ill., 379. As to the right of adjacent property

owners to enjoin a city from erecting a market upon land formerly platted as a street, but which has been vacated as a street and used by the city for more than thirty years for market purposes, see *Cooper v. Detroit*, 42 Mich., 584, 4 N. W., 262.

<sup>69</sup> *McLachlan v. Town of Gray*, 105 Iowa, 259, 74 N. W., 773.

<sup>70</sup> *Texarkana v. Leach*, 66 Ark., 40, 48 S. W., 807, 74 Am. St. Rep., 67.

<sup>71</sup> *Smith v. McDowell*, 148 Ill., 51, 35 N. E., 141, 22 L. R. A., 393.

a special remedy at law against a plank-road company for neglecting to keep its road in repair, equity will not entertain jurisdiction to restrain it from collecting its tolls until the proper repairs are made, but will leave the party complaining to avail himself of his legal remedy.<sup>72</sup>

§ 596. **Closing highway.** A court of chancery may, it would seem, restrain the commission of an act which is likely to result in irreparable injury to an individual, or to be prejudicial to the public, pending proceedings before the proper tribunal to determine as to the authority to commit the act. And where an injunction has been granted to restrain the closing up of a road until defendant can show some legal authority for his action, it will not be dissolved in the absence of any showing of such authority.<sup>73</sup> Where, however, the owner of real estate over which the public authorities, without legal right, assert a claim to a highway, attempts to take possession of and to close up such highway, but is interfered with by the authorities, an injunction is the appropriate remedy to prevent such interference.<sup>74</sup> But where a road has been properly discontinued, the forcible re-opening thereof and the removal of fences necessary in re-opening it will not warrant a court of equity in interfering. Such acts are regarded as mere trespasses for which the law affords ample relief and they will not be enjoined in equity.<sup>75</sup>

§ 597. **Disfiguration of premises by proposed road; land acquired for specific purpose.** It may sometimes happen from the peculiar circumstances of a particular case that an injury, ordinarily susceptible of relief at law, is so irreparable in its character as to require the interposition of

<sup>72</sup> *Commonwealth v. Wellsboro' & T. P. R. Co.*, 35 Pa. St., 152.

<sup>73</sup> *Williamson v. Carnan*, 1 Gill & J., 184.

<sup>74</sup> *Oliphant v. Commissioners of Atchison Co.*, 18 Kan., 386.

<sup>75</sup> *Nichols v. Sutton*, 22 Ga., 369. But see, *contra*, *Lyle v. Lesia*, 64 Mich., 16, 31 N. W., 23.

the strong arm of equity for its prevention. Thus, where it is alleged in the bill that complainant's premises, through which it is proposed to construct a road, are of symmetrical proportions and easily cultivated, and that the passage of the proposed road through the premises will greatly disfigure them and increase the expense and difficulty of their cultivation, an injunction will issue. Under such circumstances the relief is extended on the ground that the injury, being irreparable in its character and of continuing duration, can not be remedied by an action at law for damages.<sup>76</sup> So equity will sometimes interfere with the construction of public works for the purpose of protecting parties in the enjoyment of their premises for the particular purposes for which they were acquired. Thus, commissioners of highways will be enjoined from laying out a road across complainant's railway track and grounds acquired for engine-houses and other like uses of the railway. The land having been acquired for specific purposes, an injunction is regarded as the proper remedy to secure its quiet enjoyment.<sup>77</sup>

§ 597 *a*. **Unauthorized opening or maintenance of highway enjoined.** The unauthorized opening of a highway through plaintiff's premises and the cutting of his timber and hedges and the removal of his fences in opening the highway constitute sufficient grounds for an injunction, even though it is not shown that defendants are insolvent, the injury in such case being regarded as irreparable.<sup>78</sup> And a road-overseer may be enjoined from tearing down plaintiff's fences and destroying his trees under pretense of keeping open an alleged highway across plaintiff's premises, when in fact no such highway exists, the relief being granted upon the ground that such unlawful acts might become the founda-

<sup>76</sup> *Champion v. Sessions*, 1 Nev., 478.

<sup>77</sup> *Albany & N. R. Co. v. Brow-*

*nell*, 24 N. Y., 345; *Mohawk & H. R. Co. v. Artcher*, 6 Paige, 87.

<sup>78</sup> *McPike v. West*, 71 Mo., 199.

tion of adverse rights, and also for the prevention of a multiplicity of suits.<sup>79</sup>

§ 597 *b*. **Unauthorized use of streets by gas company enjoined.** A land owner whose lands are crossed by a public highway and who owns the fee in such highway, subject to the public easement, may restrain a corporation from laying and maintaining a line of pipes under the highway, for the purpose of supplying natural gas, until compensation has been made for the injury to his property.<sup>80</sup> And a gas company may be enjoined at the suit of a town from excavating in the streets and laying its pipes, the company having received no license or authority from the town.<sup>81</sup>

§ 597 *c*. **Injunction against steam-roller in highway.** Where a gas company has laid its pipes in a highway, under legislative authority, in a proper manner, due regard being had for what, at the time of laying the pipes, was ordinary traffic and reasonable and ordinary means of repairing roads, an injunction will lie to restrain the municipal authorities from using a steam-roller in repairing the road, thereby resulting in the breaking of plaintiff's pipes which were properly laid at a time before steam-rollers came into use.<sup>82</sup>

§ 597 *d*. **Municipality may enjoin improvement contrary to ordinance.** Where an ordinance has been adopted calling for the improvement of a street and sidewalk in a particular manner and an abutting property is proceeding to make the improvements in a manner which differs materially from the specifications and requirements of the ordinance,

<sup>79</sup> Chadbourne *v.* Zilsdorf, 34 Minn., 43, 24 N. W., 308.

<sup>80</sup> Sterling's Appeal, 111 Pa. St., 35, 2 Atl., 105.

<sup>81</sup> Citizens G. & M. Co. *v.* Town of Elwood, 114 Ind., 332, 16 N. E., 624.

<sup>82</sup> Alliance & D. C. G. Co. *v.* Dublin County Council, (1901) 1 L. R. Ir., 43; Gas Light & Coke Co. *v.* Vestry of St. Mary Abbott's, 15 Q. B. D., 1.



an injunction is the appropriate remedy upon behalf of the municipality to restrain such unauthorized action.<sup>83</sup>

§ 597 *e*. **Injunction against total obstruction of street.** Since the owner of land abutting upon a public highway has, as appurtenant to his property, an easement consisting of the right to the free and unimpeded use of the street to its full width, any permanent obstruction whereby he is totally or practically deprived of such right, even though the obstruction be under legislative authority, constitutes a taking of private property without compensation and will be enjoined. Thus, where the defendant, acting under a legislative and municipal grant, is erecting a stone approach to a toll bridge which is of such a character as to leave a space in front of plaintiff's premises so narrow as to render the street totally unfit for its legitimate use, an injunction will be granted until the plaintiff's easement is condemned and proper compensation made. And the relief is granted in such case regardless of the ownership of the fee to the highway.<sup>84</sup>

§ 597 *f*. **Telegraph and telephone poles; electric light poles and wires.** As to the right of the owner of property abutting upon a highway to restrain the location of telegraph or telephone poles along the highway without compensation being first made him for the injury caused thereby, the authorities are conflicting. Upon the one hand, it has been held that the location of such poles, whether for telephone or telegraph purposes, constitutes no new or additional use of the highway and relief by injunction is accordingly denied.<sup>85</sup> Upon

<sup>83</sup> *Drew v. Town of Geneva*, 150 Co., 60 Minn., 539, 63 N. W., 111, Ind., 662, 50 N. E., 871, 42 L. R. 28 L. R. A., 310; *Magee v. Over-*  
A., 814. shiner, 150 Ind., 127, 49 N. E., 951,

<sup>84</sup> *Willamette Iron Works v. O.* 40 L. R. A., 370. See this last case  
R. & N. Co., 26 Ore., 224, 37 Pac., for an exhaustive review of the  
1016, 29 L. R. A., 88, 46 Am. St. authorities upon the question  
Rep., 620. whether the erection of such poles

<sup>85</sup> *Cater v. Northwestern T. E.* imposes an additional servitude.

the other hand, there is excellent authority for holding that where the fee to the street is in the abutter, the erection of such poles imposes an additional servitude upon the highway for which the abutting owner is entitled to recover compensation and that an injunction is the proper remedy to prevent such an intrusion until such compensation is ascertained and paid.<sup>86</sup> But where the fee to the highway is in the municipality, the abutting owner can not enjoin the erection of electric light poles and the stringing of wires because of the alleged illegality of the ordinance under which the work is being done, where he shows no injury different in kind from that suffered by the public generally.<sup>87</sup> But the owner of property abutting upon a private alley may enjoin the placing of such poles and the stringing of wires over the alley for the purpose of furnishing light to adjoining lot owners, where the fee to the alley is in the abutter and such use amounts to the imposition of an additional servitude.<sup>88</sup>

§ 597 *g*. **Injunction on behalf of telephone company against electric street railway.** Regarding the question of granting equitable relief upon behalf of a telephone company whose wires are strung under or along a highway to restrain the operation of an electric street railway upon the highway and the consequent interference with its telephone service resulting from the grounding of the defendant's current or from the induction from its trolley wires, it would seem

And in *Coburn v. New T. Co.*, 156 Ind., 90, 59 N. E., 324, 52 L. R. A., 671, it was held that the abutting owner who also owned the fee to the center of the street could not enjoin the construction of a conduit for telephone wires along the edge of a sidewalk and three feet from plaintiff's lot line, since such use imposed no new use upon the highway.

<sup>86</sup> *Stowers v. Postal Tel. Co.*, 68 Miss., 559, 9 So. 356, 12 L. R. A., 864, 24 Am. St. Rep., 290; *Donovan v. Allert*, 11 N. Dak., 289, 91 N. W., 441, 58 L. R. A., 775.

<sup>87</sup> *McWethy v. A. E. L. Co.*, 202 Ill., 218, 67 N. E., 9.

<sup>88</sup> *Carpenter v. Capital Electric Co.*, 178 Ill., 29, 52 N. E., 973, 43 L. R. A., 645, 69 Am. St. Rep., 286.

that so long as the defendant constructs its electrical system in a reasonable and proper manner, taking due care not to interfere unreasonably with the rights of the plaintiff, no case is presented for the interposition of equity. Under such circumstances, the operation of an electric street railway is regarded as a legitimate use of the highway, to which its use for the purpose of telephone service is to be held subservient, and the fact that the presence of the electric current seriously interferes with the proper operation of the plaintiff's lines is regarded as *damnum absque injuria*, and equitable relief is accordingly denied.<sup>89</sup> If, upon the other hand, the defendant constructs and operates its electric system with a wilful or wanton disregard of the rights of the plaintiff and without the exercise of ordinary or reasonable care to prevent undue interference with the plaintiff's service, such conduct amounts to an improper use of the highway and an abuse of its franchise by the defendant, and will accordingly be restrained by injunction.<sup>90</sup>

§ 597 *h*. **Injunction on behalf of electric lighting company against rival company in highway.** Where an electric lighting company has entered into a contract with a municipality for the lighting of its streets and in pursuance thereof has erected its poles and strung its wires in which is conducted a current of low tension, and the defendant, a rival company, under permission from the municipal authorities, afterwards erects its poles and strings its wires in such a way as to cause imminent danger to plaintiff's property and to its employees resulting from the proximity of defendant's

<sup>89</sup> *Cumberland T. & T. Co. v. 588. And see Hudson River T. Co. United Electric R. Co.*, 42 Fed., *v. Watervliet, T. & R. Co.*, 121 N. 273, 12 L. R. A., 544, 43 Am. & Eng. Y., 397, 24 N. E., 832. R. Cas., 194; *Cincinnati I. P. R. Co. v. Telephone Association*, 48 Ohio St., 390, 27 N. E., 890, 12 L. So., 731. R. A., 534, 46 Am. & Eng. R. Cas.,

wires and the fact that they carry a current of very high tension, an injunction is properly granted restraining the defendant from maintaining its wires in such a way as to interfere with those of the plaintiff.<sup>91</sup>

<sup>91</sup> Rutland E. L. Co. *v.* M. C. E. R. A., 821, 36 Am. St. Rep., 868. Co., 65 Vt., 377, 26 Atl., 635, 20 L.

## CHAPTER X.

### OF INJUNCTIONS AGAINST RAILWAYS.

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#### I. PRINCIPLES GOVERNING THE JURISDICTION.

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### § 598. Considerations of relative inconvenience and injury.

Courts of equity are frequently called upon to interfere by injunction with the construction of railroads in such manner or under such circumstances as would be productive of irreparable injury. In exercising its jurisdiction over cases of this nature a court of equity will in the use of a sound discretion balance the relative inconvenience and injury which is likely to result from granting or withholding the writ, and will be largely governed by such circumstances in determining upon the relief. And where an injunction restraining the use of a railway would not only be productive of great injury to the railway company and to the public, but would result in no corresponding advantage to any one, not even to the persons asking such relief, it will not be granted.<sup>1</sup> So where the work of constructing a railway is of great magnitude and one involving large expense, if it is apparent that the injury which would result to defendant by granting the injunction, in case the result should prove it to have been wrongly granted, would be greater than that which would result to complainant from a refusal of the injunction, in the event of the legal right being proved to be in his favor, the court will not interpose.<sup>2</sup> And where the continuance of an interlocutory injunction against the construction of a railway will prevent the consummation of a costly public enterprise, and thereby be

<sup>1</sup> *Torrey v. Camden & A. R. Co.*, 3 C. E. Green, 293; *Booraem v. North H. C. R. Co.*, 40 N. J. Eq., 557, 5 Atl., 106.

*v. Alabama G. T. R. Co.*, 96 Ala., 272, 11 So., 483, 17 L. R. A., 474. <sup>2</sup> *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Cr., 784; *Hackensack Improvement Commission v. & B. R. Co.*, 3 Myl. & Cr., 784; *New Jersey Midland R. Co.*, 7 C. E. Green, 94.

productive of serious inconvenience to the public, it is proper to modify the injunction so as to allow the work to proceed upon giving adequate security to pay such damages as may be occasioned by the taking and occupation of the land in controversy.<sup>3</sup> And equity will not, *in limine*, at the suit of a municipal corporation, enjoin the construction of a railroad under legislative authority within the limits of the municipality, when the legal right upon which the claim to relief is based is doubtful and unsettled.<sup>4</sup>

§ 599. **Railway company held to strict compliance; unauthorized extension of track.** Courts of equity are inclined to hold railway companies to a strict compliance with the terms and conditions upon which they have been permitted to enter upon land necessary for the construction of their lines, and in default of compliance with such conditions they are not entitled to the protection of equity. Thus, where a railway company is forbidden by statute to construct its road upon the streets of an incorporated city without the assent of the corporate authorities, and when the city has granted a right of way to the company upon certain express conditions, which have not been fulfilled, the authorities will not be enjoined from re-entering and taking possession of the grounds granted the railway company, the privilege of re-entering in case of default on the part of the company having been reserved in the contract.<sup>5</sup> And the unauthorized extension of its track by a railway company is the exercise of a valuable franchise, and is of itself sufficient ground for relief by injunction.<sup>6</sup>

<sup>3</sup> *Coe v. New Jersey M. R. Co.*, 28 N. J. Eq. (1 Stew.), 27; *City of Portland v. Oregonian R. Co.*, 7 Sawy., 122; *Wellington & P. R. Co. v. Cashie & C. R. Co.*, 116 N. C., 924, 20 S. E., 964.

*r. West End R. Co.*, 29 N. J. Eq. (2 Stew.), 566.

<sup>5</sup> *Pacific R. Co. v. Leavenworth*, 1 Dill., 393.

<sup>6</sup> *People v. Third Avenue R. Co.*, 45 Barb., 63.

<sup>4</sup> *Long Branch Commissioners*

§ 600. **Violation of conditions; railway and canal company.** In conformity with the general rule laid down in the preceding section, requiring a strict compliance on the part of railway companies with the conditions annexed to the grant of a right of way, it has been held that where a railway has been permitted to enter one's land and construct its road on condition of refraining from a specific injury irreparable in its nature and not easily estimated in damages, an injunction will lie to restrain the violation of such condition.<sup>7</sup> But where, as between a railway and canal company, an injunction has been granted restraining the one from locating its route on the ground of prior and paramount right of choice in the other, if it appears that the defendant is properly entitled to a priority of choice in the selection of ground for its route, the injunction will be dissolved.<sup>8</sup>

§ 601. **Contest as to possession.** The sole object of a preliminary injunction being to protect the property or rights in controversy until a final hearing upon the merits, a court of equity will not interfere to take property out of the possession of one party and put it into the possession of another. And where complainants allege that they are entitled to the possession of a railway, but that defendants are in actual possession under claim of right, it is improper to restrain defendants from using the road until the right can be determined.<sup>9</sup>

§ 602. **Construction of railroads.** The construction of a railway in a city is not regarded as a nuisance *per se* and the laying of its track along a public street will not be enjoined on that ground.<sup>10</sup> Nor can a private property

<sup>7</sup> Unangst's Appeal, 55 Pa. St., 53 Pa. St., 224; Minneapolis & S. L. R. Co. v. C., M. & St. P. R. Co., 128.

<sup>8</sup> Canal Company v. Railroad 116 Iowa, 681, 88 N. W., 1082.  
Company, 4 Gill & J., 1.

<sup>10</sup> New Albany & S. R. Co. v.

<sup>9</sup> Farmers R. Co. v. Reno R. Co., O'Daily, 12 Ind., 551; Fulton v.

owner, abutting upon and owning the fee to the center of a street, enjoin the construction of an ordinary surface railway in the street, upon the ground of nuisance, when he shows no special injury which will result to him from such construction.<sup>11</sup> And the owner of property abutting upon a street the fee of which is in the municipality can not enjoin the operation of a loop of a street railway in the highway upon the ground that it impairs his easement, since the injury thus inflicted is susceptible of compensation in an action at law for damages.<sup>12</sup> Such control may, however, be exercised by a court of equity over the particular manner of construction as is necessary for the prevention of serious and irreparable injury. And where a railway company is erecting an arch over a mill race in such manner as to be productive of serious injury to the mill, it may be enjoined from making its arch of less than certain specified dimensions, such as will obviate the injury.<sup>13</sup> So where a railway company is proceeding to enter upon private property for the purpose of locating its road, an injunction may be granted until the opening of a street through which the road is, by its act of incorporation, required to pass.<sup>14</sup> And a railway company which is authorized by law to construct its road across any public highway, upon condition that it shall restore the highway to its former state of usefulness, may be enjoined from constructing its road lengthwise in the highway, and from intersecting it at such an angle as to render it dangerous to the public, and may also be compelled to remove obstructions upon failure to comply with the conditions required by the court as to the method of construction.<sup>15</sup> And a railway

Short Route R. T. Co., 85 Ky., 640,  
4 S. W., 332.

<sup>13</sup> Coats v. Clarence R. Co., 1  
Russ. & M., 181.

<sup>11</sup> Garnett v. Jacksonville, St. A.  
& H. R. R. Co., 20 Fla., 889.

<sup>14</sup> Jarden v. Philadelphia, W. &  
B. R. Co., 3 Whart., 502.

<sup>12</sup> Haskell v. Denver T. Co., 23  
Col., 60, 46 Pac., 121.

<sup>15</sup> State v. Dayton & S. E. R.  
Co., 36 Ohio St., 434.

company, having similar powers, may be compelled by mandatory injunction to restore a highway to its former condition of usefulness, the suit, in such case, being properly brought by the town when it is charged by law with the duty of keeping in repair all public highways.<sup>16</sup>

§ 603. **Change of route; quo warranto; canal.** Where a railway company has obtained municipal subscriptions in aid of the construction of its road, upon its agreement to construct it upon a given route and to certain prescribed points, the company being of doubtful financial ability to construct its main line as agreed, equity may in behalf of the municipality enjoin the construction of a branch road by the company which is likely to render it incapable of completing its main line as agreed.<sup>17</sup> Where, however, a railway company is empowered to build three different lines of road, and after constructing one of the three it abandons the others, upon a bill by a shareholder to enjoin the application of its funds except with a view to the construction of the three lines as authorized, the court may properly weigh the relative convenience and inconvenience to the parties, and refuse the injunction when it is apparent that more inconvenience will result from granting than from refusing it. And additional ground for refusing the relief in such case is found in the fact that complainant has acquiesced in the abandonment for a considerable period of time.<sup>18</sup> So the fact that a railway company, which is organized to build a specified line of road, intends to construct but a part of such line instead of the whole affords no

<sup>16</sup> *Town of Jamestown v. Chicago, B. & N. R. Co.*, 69 Wis., 648, 34 N. W., 728. See *County of Cook v. Great Western R. Co.*, 119 Ill., 218, 10 N. E., 564.

<sup>17</sup> *Town of Platteville v. Galena & Southern Wisconsin R. Co.*, 43 Wis., 493. It is to be observed,

however, that this decision was given under a statute prohibiting any railway from diverting its road from a municipality from which it had received aid.

<sup>18</sup> *Hodgson v. Earl of Powis*, 1 De Gex, M. & G., 6.



ground for enjoining such construction.<sup>19</sup> Nor does the fact that proceedings are pending against the railway company in *quo warranto* to procure its dissolution afford any ground for such an injunction.<sup>20</sup> Nor will the relief be granted to restrain persons, who are authorized by act of parliament to construct a canal, from cutting through their own lands for that purpose, upon the ground of insufficiency of their funds for the completion of the undertaking.<sup>21</sup>

§ 604. **Injunction against issuing free passes.** Upon a bill by a shareholder in a railway company seeking to enjoin the company from issuing free passes to members and officers of a state legislature upon the ground of diminishing the revenues of the company, the fact that it has previously issued such passes is not of itself ground for the relief, it not being shown that the company intends issuing them in the future. And the mere fears and apprehensions of the plaintiff, in such case, are not sufficient to warrant the relief, but the court itself must be satisfied that the wrong is about to be committed before it will interfere.<sup>22</sup>

§ 605. **Injunction against consolidation or extension.** An injunction is the appropriate remedy in behalf of a shareholder in a railway company to prevent its consolidation with another company, when complainant has not consented to such consolidation. And in such case complainant is not estopped from relief by the fact that as a director of the company he acquiesced at a meeting of directors in proceedings preliminary to the consolidation and preliminary to a vote of the shareholders upon the question.<sup>23</sup> But a stockholder can not enjoin an extension of the line of a railway company by its directors, when their action in making

<sup>19</sup> *Aurora & C. R. Co. v. City of Lawrenceburgh*, 56 Ind., 80.

<sup>20</sup> *Id.*

<sup>21</sup> *Mayor v. Pemberton*, 1 Swanst.,

<sup>22</sup> *Goodwin v. New York, N. H. & H. R. Co.*, 43 Conn., 494.

<sup>23</sup> *Mowrey v. Indianapolis & C. R. Co.*, 4 Bissell, 78.

such extension is within the scope of the corporate powers of the company and is free from fraud.<sup>24</sup>

§ 606. **Rights of bondholders.** One of several bondholders secured by a railway mortgage will not be allowed an interlocutory injunction to prevent the transfer to a foreign railway corporation of so much of the mortgaged property as is located within the state, when the property is of such a nature that it can not be removed from the state, and when no formal transfer can injure plaintiff pending his action, the property still remaining in the state and subject to the final decree in the cause.<sup>25</sup> But where by the terms of a mortgage securing the bonds of a railway it is provided that all subsequently acquired property shall be subject to the mortgage, the holders of such bonds, in an action brought in behalf of themselves and all others similarly situated, may enjoin the sale or disposition of iron rails subsequently acquired by the company, which have been pledged to persons having notice of the equities of the bondholders, but are not entitled to such injunction as against pledgees advancing money and taking the rails as security in good faith, and without notice of complainants' equities.<sup>26</sup> And a railway company may be enjoined, upon a bill filed in behalf of its mortgage bondholders, from aiding and encouraging in the building of another road which would operate to divert business from the former road, and thereby depreciate the security for its bonds, the interest on the bonds being unpaid and largely in arrears.<sup>27</sup>

§ 607. **Construction of bridges; grade crossings.** A railway company which is entitled to construct a bridge over

<sup>24</sup> *Sims v. Street Railroad Co.*, 37 Ohio St., 556. As to the right of a shareholder to restrain the company from paying interest upon its mortgage bonds which have been redeemed by and are held to the credit of a sinking fund, see

*Wilds v. St. Louis, A. & T. H. R. Co.*, 102 N. Y., 410, 7 N. E., 290.

<sup>25</sup> *McHugh v. Boston, H. & E. R. Co.*, 66 Barb., 612.

<sup>26</sup> *Weetjen v. St. Paul & P. R. Co.*, 4 Hun, 529.

<sup>27</sup> *Pullan v. Cincinnati & Chicago Air Line R. Co.*, 4 Bissell, 35.

the track of another road may have an injunction to restrain the latter company from interfering with such construction.<sup>28</sup> And in the absence of express legislation regulating the manner in which one railway shall cross another, a court of equity may properly entertain jurisdiction of the matter, and may enjoin the new road from crossing the old one at grade, when it is for the manifest interest and advantage of both roads that the one should cross the other at a different level or grade.<sup>29</sup> So it is held that a provision in a state constitution authorizing a railway company to intersect, connect with, or cross any other railroad is not self-acting and does not authorize a company to intersect the tracks of another in its own discretion. An injunction will therefore lie to prevent such crossing until defendant's right has been fixed either by negotiation or by legal proceedings.<sup>30</sup> But equity will not enjoin a railway company from proceeding under the eminent domain act of the state to acquire a right of way across complainant's tracks, defendant being authorized under the law of the state to effect such crossing, and no injury being shown as likely to result from the proposed crossing which can not be adequately compensated in damages.<sup>31</sup>

§ 608. **Breach of operating contracts.** An injunction has been allowed to restrain a railway company from preventing

<sup>28</sup> *Great, etc., R. Co. v. Clarence R. Co.*, 1 Coll., 507. And the injunction in this case seems to have been granted, in effect, as a mandatory injunction, restraining defendant from continuing to maintain and uphold certain walls erected by it, whereby plaintiffs were prevented from constructing their bridge.

<sup>29</sup> *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Bissell, 219.

<sup>30</sup> *Missouri, K. & T. R. Co. v.*

*Texas & St. L. R. Co.*, 4 Woods, 360; S. C., 10 Fed., 497.

<sup>31</sup> *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 Ill., 506. As to the right to enjoin a grade crossing and as to the effect of non-user of defendant's franchises for a series of years, in such case, see *Western P. R. Co.'s Appeal*, 104 Pa. St., 399. As to the right to enjoin a grade crossing under the laws of Iowa, see *H. & S. R. Co. v. C., St. P. & K. C. R. Co.*, 74 Iowa, 554, 38 N. W., 413.

the plaintiff company from using defendant's line in the manner and upon the terms provided in an agreement between the two companies.<sup>32</sup> And where two railway companies had entered into an agreement for using interchangeably each other's roads upon certain prescribed terms, an injunction was granted to restrain one of the companies from depriving the other of the use of its road under the contract.<sup>33</sup>

§ 609. **When injunction refused against street railway.** A street railway company, which is authorized by its charter to lay its tracks in a given street in a city, but which has no exclusive authority under the terms of its charter, can not maintain an action to restrain another company from laying and operating its tracks under an authority conferred by its charter. In such a case, even if there be an excess of power on the part of the defendant company, the public alone can interfere by injunction to restrain its operations; and the plaintiff company, having no exclusive rights in such street, can not interfere to protect the public interest, unless some actual interference with its own tracks is done or threatened.<sup>34</sup> So a street railway company which is authorized by a city to operate its road through a given street, but which has no exclusive right therein, is not entitled to an injunction to restrain another company, authorized by the city, from building its line of road upon the street.<sup>35</sup> And since the grant to a railroad company of the privilege of laying its tracks upon or across a public highway does not give it the exclusive right to the use of the street but merely the right to its use in common with the public gen-

<sup>32</sup> Great Northern R. Co. v. Lancashire & Y. R. Co., 1 Sm. & Gif., 81. Co. v. Central C. R. Co., 67 Barb., 315; S. C., 4 Hun, 630.

<sup>33</sup> Great Northern R. Co. v. Manchester R. Co., 5 De Gex & Sm., 138. <sup>35</sup> New Orleans City R. Co. v. Crescent City R. Co., 23 La. An., 759. See also Kinsman Street R. Co. v. Broadway & N. S. R. Co., 36

<sup>34</sup> Christopher & Tenth Street R. Ohio St., 239.

erally, it can not enjoin a street railway company from laying its tracks in the highway across its own.<sup>36</sup> But in a contest between two railway companies, each claiming a right of way in a street, a preliminary injunction may be properly granted to maintain plaintiff in its possession, but not to oust a company already in possession.<sup>37</sup> A street railway company can not, however, enjoin the moving of a building along its tracks when the interruption caused thereby to its business is but temporary and the injury may be readily determined and may be compensated in damages.<sup>38</sup>

§ 610. **Running coaches on street railway; injunction against laying street railway.** It is also held that a street railway company, claiming the exclusive right to run cars upon its road as laid in the streets of a city, is not entitled *in limine* to an injunction restraining vehicles, such as coaches, from using the road of complainant in the streets, under a claim of right to exclude from the street competing vehicles, when the right asserted by complainant is undetermined and is dependent upon disputed propositions of law.<sup>39</sup> Where, however, plaintiff, a railway company, had maintained its track upon a strip of land in a city street for more than twenty years, claiming title thereto by grant from the original owners at a period prior to the incorporation of the city, and had obtained an interlocutory injunction restraining defendants from laying a street railway beside plaintiff's, under a grant from the city authorities, the court refused to dissolve the injunction upon bill and answer, and

<sup>36</sup> Chicago, B. & Q. R. Co. v. W. La. An., 561. As to the right of a C. S. R. Co., 156 Ill., 255, 40 N. E., street railway company to enjoin 1008, 29 L. R. A., 485; General a steam railway company from Electric R. Co. v. C. & W. I. R. Co., crossing its tracks in the streets 184 Ill., 588, 56 N. E., 963; Atchison of a city, see Atchison Street R. Co. v. S. F. R. Co. v. General Co. v. Missouri P. R. Co., 31 Kan., Electric R. Co., 50 C. C. A., 424, 112 660, 3 Pac., 284.  
Fed., 689.

<sup>37</sup> New Orleans & N. E. R. Co. v. son, 108 Ill., 64.  
Mississippi, T. B. & L. R. Co., 36

<sup>39</sup> Citizens Coach Co. v. Camden



retained it until the final hearing, in order that the question of title might be properly determined.<sup>40</sup>

§ 611. **Condemnation of part of street railway by another; exclusive rights of way.** In Illinois it is held that a horse railway company can not, under the eminent domain act of the state, acquire for its own use by proceedings for condemnation a portion of a street railway previously constructed by another company and in successful operation, and by thus taking a fragment of defendant's road destroy its usefulness and impair defendant's franchise; and a perpetual injunction will lie to prevent such injury to and obstruction of defendant's property and franchise.<sup>41</sup> And it is held in New York, that when a railway company files a map and survey of its proposed route and gives the required notice to property owners affected by such location, it acquires a right to construct its line upon such route to the exclusion of all other companies. Another railway company may, therefore, be enjoined from laying tracks upon such proposed route so as to obstruct or interfere with the construction of plaintiff's road.<sup>42</sup> But a railway company claiming title as lessee of another company to certain lands and rights of way which have been abandoned for railroad purposes, its lease being held invalid, can not enjoin another company from entering upon and constructing its road over the premises in question.<sup>43</sup>

§ 612. **Filling up canal by railway company.** When a railway company, without authority, is filling up the location of

Horse R. Co., 29 N. J. Eq. (2 Stew.), 299.

<sup>40</sup> Camden & A. R. Co. v. Atlantic City P. R. Co., 11 C. E. Green, 69.

<sup>41</sup> Central City H. R. Co. v. Fort Clark H. R. Co., 81 Ill., 523.

<sup>42</sup> Rochester, H. & L. R. Co. v. New York, N. E. & W. R. Co., 110 N. Y., 128, 17 N. E., 680. And see

Western N. C. R. Co. v. Georgia & N. C. R. Co., 88 N. C., 79. As to

the right of highway commissioners in New York to enjoin a street railway company from abandoning a portion of its route, see Moore v. Brooklyn City R. Co., 108 N. Y., 98, 15 N. E., 191.

<sup>43</sup> Troy & B. R. Co. v. Boston, H. T. & W. R. Co., 86 N. Y., 107.

a public canal, owned by a state, in such manner as to entirely obstruct its use, an injunction will lie to restrain such action. And in such a case, the company acting in excess of its powers, no question of damage is presented, but simply a question of the invasion of plaintiff's right. It is not necessary, therefore, that any irreparable injury should be shown to warrant the relief, nor can defendant in such case justify its action or prevent an injunction upon the ground that the part of the canal in controversy is practically abandoned.<sup>44</sup>

§ 613. **Excess of authority in authorizing street railway.** The authority of the body granting permission for the construction of a road may be called in question, and it would appear that where such authority has been exceeded the work may be enjoined.<sup>45</sup> Thus, where the common council of a city has exceeded its power in authorizing the construction of a street railway and its operation for an indefinite period of time, the construction of the road may properly be enjoined.<sup>46</sup>

§ 614. **Planting trees; construction of levees.** Under the authority of equity to interfere for the prevention of irreparable mischief, a railway company may be enjoined from planting trees so close to one's land as to overshadow it and to cause the roots to spring up to the damage of the soil.<sup>47</sup> And where a statute provides that in the construction of levees over private property just compensation shall be paid to the owners for damages thereby incurred, an injunction may properly issue to stay proceedings until the damages have been ascertained and paid according to law.<sup>48</sup>

§ 615. **Cautious exercise of jurisdiction.** From the peculiar nature of works of public improvement and the serious in-

<sup>44</sup> *Commonwealth v. Pittsburg & C. R. Co.*, 24 Pa. St., 159.

<sup>46</sup> *Milhau v. Sharp*, 27 N. Y., 611.

<sup>47</sup> *Brock v. Connecticut, etc.*, 35

<sup>45</sup> *Milhau v. Sharp*, 27 N. Y., 611; *Vt.*, 373.

*Hays v. Jones*, 27 Ohio St., 218.

<sup>48</sup> *Horton v. Hoyt*, 11 Iowa, 496

jury that may result from any unwarranted interference with their construction, the jurisdiction in restraint of such works is exercised with great caution, keeping constantly in view the damage that may result from improperly restraining their operation. Except in cases of peculiar hardship, an injunction should not be granted against the construction of a public work before the coming in of the answer, since the granting of an injunction upon every *ex parte* bill which might be presented would place such works at the mercy of every landed proprietor through whose premises they pass.<sup>49</sup>

§ 616. **Refusal to deliver to consignee; imposing additional or illegal charges; use of wharves.** Where, however, a railway company in its capacity as a common carrier refuses to make a personal delivery of goods to a consignee, the fact that a statutory remedy has been provided will not prevent a court of equity from entertaining jurisdiction of the matter if the statutory remedy is inadequate. And where the course pursued by the carrier is such as to greatly injure if not destroy the business of complainants, and damages at law would afford no just compensation for the injury, an injunction is the proper remedy. Nor will such carrier be allowed to impose upon certain warehousemen additional charges beyond what are imposed upon others, and it may be enjoined from attempting to levy such charges.<sup>50</sup> So where complainant, a coal mining company, having its tram-road connected with defendant's railway, and being entirely dependent upon such railroad for the means of transporting its coal to market, sustains special damages and injury by reason of illegal exactions by defendant in excess of the rates fixed by law, an injunction

<sup>49</sup> *Elmslie v. Delaware & S. C. Co.*, 4 Whart., 424. And see *Dela-*  
*ware & R. Canal v. Raritan & D. B. Co.*, 1 McCart., 445.

<sup>50</sup> *Vincent v. Chicago & A. R. Co.*,  
49 Ill., 33.

may be allowed to prevent defendant from receiving higher rates than those allowed by law. And the relief is regarded as appropriate in such case upon the ground of the injury being a constantly recurring one, for which there is no adequate remedy at law.<sup>51</sup> But a mandatory injunction was refused in the first instance, when sought by dealers and shippers of coal to compel a railway company to allow or continue to plaintiffs such use of wharves and wharfing privileges for shipping coal as were required for their business.<sup>52</sup>

**§ 617. Judgment creditors enjoined at suit of bondholders.**

It is also held that where judgment creditors have levied upon a large portion of the rolling stock of a railway, a sale of which would result in stopping the operations of the road, mortgage bondholders of the company, whose mortgage is a prior lien to that of the judgment creditors, are entitled to an injunction to restrain proceedings under the execution.<sup>53</sup> And where large numbers of judgment creditors, claiming conflicting liens upon a railroad, are proceeding to sell parts of the road under legal process, equity may properly interfere at the suit of a bondholder by the granting of an injunction and the appointment of a receiver for the benefit of all parties in interest, and may restrain such sales for the purpose of preventing irreparable injury and a multiplicity of suits.<sup>54</sup>

<sup>51</sup> *American Coal Company v. Consolidation Coal Company*, 46 Md., 15.

<sup>52</sup> *Audenried v. Philadelphia & R. R. Co.*, 68 Pa. St., 370.

<sup>53</sup> *Coe v. Pennock*, 6 Am. Law Reg. O. S., 27.

<sup>54</sup> *Noble Brothers v. State of Alabama*, 43 Ga., 466. In this case the State of Alabama, having indorsed the bonds of a railway company and being secured by mort-

gage upon the road, which was operated through several different states forming one continuous line, filed its bill in Georgia to restrain a sale there of detached portions of the road by different and conflicting judgment creditors, and obtained an injunction and receiver for the purpose of preventing a sale of the road in detached parts, and for its better preservation for the benefit of all concerned.

§ 618. **Laches and acquiescence of property owner a bar to relief.** To entitle one to relief by injunction against the construction of a railroad over his land, he must use due diligence in the assertion of his rights, since the relief will not be granted in favor of one who has been guilty of great laches, and who has by his own conduct given an implied assent to the construction of the work which he afterward seeks to restrain. Thus, where the owner of land has silently stood by and neglected to assert his rights, and has permitted a railway company to enter upon his land and to proceed with the erection of its works for a considerable length of time without interruption or complaint, he is estopped from the aid of equity for the prevention of the work.<sup>55</sup> And where a property owner, who seeks to enjoin a railway company from using its tracks upon a street in front of his premises, has permitted the company to expend large sums of money in the construction of its tracks, and has acquiesced in their use for a considerable number of years without objection or complaint, such acquiescence will deprive him of relief by injunction regardless of what his original equities may have been.<sup>56</sup> So an injunction has been refused in behalf of lot owners in a cemetery to restrain a railway company from constructing its road through the cemetery, plaintiffs having long slept upon their rights and permitted the company to make large expenditures, before seeking relief.<sup>57</sup>

§ 619. **Interference with right of way.** An action can not be maintained by a railway company to restrain defendant

<sup>55</sup> *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Cr., 784; *Pickert v. Ridgefield P. R. Co.*, 10 C. E. Green, 316. See also *Reisner v. Strong*, 24 Kan., 410. And see this case as to the effect of the prosecution by the property owner of an appeal from condemnation

proceedings, upon his right to an injunction.

<sup>56</sup> *Baltimore & O. R. Co. v. Strauss*, 37 Md., 237; *Ferguson v. Covington, etc., B. Co.*, 108 Ky., 662, 57 S. W. 460.

<sup>57</sup> *Wood v. Macon & B. R. Co.*, 68 Ga., 539.



from interfering with its right of way, when it is not shown that he has ever done or threatened any interference, or that he is likely to interfere with such right of way.<sup>58</sup>

§ 620. **Obstruction by rival road enjoined.** Where the defendant, a rival railway company, places an obstruction upon the approach to plaintiff's railroad in such manner as to prevent access thereto, thereby seriously diverting traffic from plaintiff's road, a fit case is presented for relief by injunction. The jurisdiction in such case is exercised for the prevention of a trespass of an irreparable nature, and not susceptible of measurement in damages.<sup>59</sup>

§ 621. **Approach to bridge.** Equity may properly interfere, upon an information by the attorney-general, to restrain a railway company from keeping the approach to a bridge in a condition not in accordance with its act of incorporation.<sup>60</sup> And a county which, under the laws of the state, is vested with general supervision and control over county roads, may enjoin a railway company from the unauthorized construction of its tracks in and along a county road.<sup>61</sup> But a court of equity will not assume jurisdiction by a bill for an injunction in behalf of the people, to restrain a railway company from operating its trains over the streets of a city, upon the ground of failure to comply with municipal ordinances under which the company has received its right of way through such streets, when such matters are clearly within the control and jurisdiction of the common council of the city.<sup>62</sup>

§ 621 *a.* **Interchange of traffic; unjust discrimination; unreasonable freight rates; stock yards; railroad may enjoin**

<sup>58</sup> *St. Joseph & D. C. R. Co. v. Dryden*, 17 Kan., 278.

<sup>59</sup> *London & N. W. R. Co. v. Lancashire & Y. R. Co.*, L. R. 4 Eq., 174.

<sup>60</sup> *Attorney-General v. Mid-Kent R. Co.*, L. R. 3 Ch., 100.

<sup>61</sup> *County of Stearns v. St. Cloud, M. & A. R. Co.*, 36 Minn., 425, 32 N. W., 91. But see *County of Cook v. Great Western R. Co.*, 119 Ill., 218, 10 N. E., 564.

<sup>62</sup> *Cairo & Vincennes R. Co. v. The People*, 92 Ill., 170.

**enforcement of unreasonable maximum freight rates; form of injunction.** A mandatory injunction may be granted to compel one railway company to receive and transport cars tendered it by a connecting line; and it affords no justification for a refusal, in such case, that the taking of the cars by the defendant company would result in a strike by its employees.<sup>63</sup> And a mandatory preliminary injunction is properly allowed to prevent a railroad company and its officers and employees from refusing to furnish to another railroad the same facilities for the inter-state transportation of freight as are afforded to other companies.<sup>64</sup> So, upon final hearing, it is proper to enjoin the defendant company from refusing to accept freight or passengers from the plaintiff company except at higher rates than are charged to persons or property received from other companies, such refusal amounting to an unjust discrimination.<sup>65</sup> So a railway company may be enjoined from making an unjust discrimination in rates as between different shippers. And a discrimination based upon the larger business done by the favored shipper will be enjoined upon the ground of preventing a multiplicity of suits. Nor will the fact that the railway company is a consolidated corporation, extending and operating its lines through different states, and made up of corporations originally existing in such different states, prevent the courts of one state through which the road is operated from giving relief in such cases.<sup>66</sup> So a number of manufacturers engaged in the same business may combine together to enjoin the members of a freight association from

<sup>63</sup> *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.*, 34 Fed., 481. As to the right to enjoin the diversion by a railway company of traffic from another road, see *Chicago & Atlantic R. Co. v. New York, L. E. & W. R. Co.*, 24 Fed., 516.

<sup>64</sup> *Toledo, A. A. & N. M. R. Co. v.*

*Pennsylvania Co.*, 54 Fed., 746, 19 L. R. A., 395.

<sup>65</sup> *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed., 650. As to the reasons for refusing an interlocutory injunction in such case, see *S. C.*, 13 Fed., 546.

<sup>66</sup> *Scofield v. Railway Co.*, 43 Ohio St., 571.

enforcing an unreasonable and unjust increase in freight rates which would result in great injury to the plaintiffs' business, the relief being granted to prevent a multiplicity of suits.<sup>67</sup> So where plaintiffs have established and used for a long term of years stock yards in connection with and adjoining defendant's railroad, they are entitled to an injunction to prevent defendant from refusing to deliver live stock at such yards and from interfering with the facilities which have been used and enjoyed by plaintiffs.<sup>68</sup> And an injunction is the appropriate remedy to prevent the enforcement of a schedule of maximum freight rates prescribed by statute or by a state board of railroad commissioners where the rates as thus fixed are so unreasonably low as to amount to the taking of private property without compensation and without due process of law.<sup>69</sup> And the relief is properly granted in such case where it appears that the probable effect of enforcing such rates would be to prevent the earning of dividends by the company.<sup>70</sup> Upon the other hand, a court of equity has no power, at the in-

<sup>67</sup> *Tift v. Southern R. Co.*, 123 Fed., 789.

<sup>68</sup> *Coe v. Louisville & N. R. Co.*, 3 Fed., 775.

<sup>69</sup> *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362, 14 Sup. Ct. Rep., 1047, 38 L. Ed., 1014; *Smyth v. Ames*, 169 U. S., 466, 18 Sup. Ct. Rep., 418; *Wallace v. Arkansas C. R. Co.*, 55 C. C. A., 192, 118 Fed., 422; *Louisville & N. R. Co. v. McChord*, 103 Fed., 216. In the Reagan case Mr. Justice Brewer uses the following language: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all

circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation." See the McChord case, *supra*, as to the right to interfere in advance of the determination of the rate by the commission.

<sup>70</sup> *Chicago & N. W. R. Co. v. Dey*, 35 Fed., 866; *Chicago, St. P., M. & O. R. Co. v. Becker*, 35 Fed., 883.

stance of a shipper and before an alleged unreasonable freight rate has been put in force or demanded by a railroad, to formulate a schedule of maximum freight rates to be charged by the carrier; and it is therefore without jurisdiction to enjoin the enforcement of rates in excess of the schedule thus prescribed.<sup>71</sup> And where a statute prohibits a railroad from demanding unreasonable rates or giving unreasonable preferences, an injunction which is merely in the terms of the statute and which simply repeats its general admonitions without specifying definite acts is improper since it leaves issues which should properly be determined by a court and jury in a proceeding for damages or for violation of the statute, to be decided in a contempt proceeding for violation of the injunction.<sup>72</sup>

§ 621 *b*. **Express facilities; sleeping cars; oil company.**

There being no duty imposed upon a railway company, either by statute or by usage, to furnish facilities for the transaction of express business by express companies, an injunction will not lie to prevent the exclusion from the lines of a railway company of an express company, upon the termination of a contract under which the express company has operated upon such lines.<sup>73</sup> Nor will equity grant an injunction to compel the specific performance of a contract between a sleeping car company and a railway company for the carriage of sleeping cars, when the contract is to continue through a series of years, requiring the court, should it assume jurisdiction, to supervise and control the performance of the contract, involving intricate details of management and administration. Nor will equity interfere, in such case, if the contract in effect gives to the plaintiff a monopoly of the sleeping car business upon defendant's road,

<sup>71</sup> Southern Pac. R. Co. v. Col. F. & I. Co., 42 C. C. A., 12, 101 Fed., & I. Co., 42 C. C. A., 12, 101 Fed., 779.

<sup>73</sup> Express Cases, 117 U. S., 1.

<sup>72</sup> Southern Pac. R. Co. v. Col. F.

since equity will not entertain jurisdiction for the protection of monopolies.<sup>74</sup> Nor will a railway company be allowed to enjoin an oil company from laying its pipes for the transportation of oil, upon the ground that it might interfere with plaintiff's privileges as a common carrier.<sup>75</sup>

§ 621 c. **Condemnation for other companies, or for improper purposes.** A railway company will not be enjoined from condemning a right of way over the tracks and lands of another company upon the ground that the road, when constructed, will be used for private purposes and for the benefit of another corporation, since the character of the road, as a public highway, is to be determined by the laws of the state and not by the intentions of its projectors.<sup>76</sup> Nor can a property owner restrain proceedings by a railway company for the condemnation of his land upon the ground that such proceedings are had under and by direction of the lessee of the company, the lease of its property and franchise being authorized by law.<sup>77</sup> So a railway company, which has succeeded by foreclosure and purchase to the property and rights of a former company, will not be enjoined from constructing a track and making a given connection which it is authorized to do under its charter, but which the former company had contracted not to do, such contract being regarded as binding only the former company.<sup>78</sup> And an injunction has been refused which was sought by property owners to restrain a railway company from constructing its road and condemning their property

<sup>74</sup> Pullman P. C. Co. v. Texas & Central R. Co., 32 N. J. Eq., 755, reversing S. C. *sub nom.* Central R. Pullman P. C. Co. v. Missouri P. R. Co. v. Pennsylvania R. Co., 31 N. J. Eq., 475.

<sup>75</sup> United N. J. R. & C. Co. v. Standard Oil Co., 33 N. J. Eq., 123; Central R. Co. v. Standard Oil Co., 33 N. J. Eq., 127.

<sup>76</sup> National Docks R. Co. v. Cen-

<sup>77</sup> Gottschalk v. Lincoln & N. R. Co., 14 Neb., 389, 15 N. W., 695.

<sup>78</sup> City of Menasha v. Milwaukee & N. R. Co., 52 Wis., 414, 9 N. W., 396.



upon the ground that the company was a fraudulent organization, the court finding it to be properly incorporated, and the proceedings to be free from fraud.<sup>79</sup> Where, however, a company is not authorized to condemn lands for depot purposes, it may be enjoined by a property owner from appropriating his land under condemnation proceedings ostensibly for other purposes for which it might rightfully exercise the power of eminent domain, but in reality for depot purposes.<sup>80</sup>

§ 621 *d.* **Injunction against monopoly; securing control of parallel line.** An injunction is the appropriate remedy, upon behalf of the state, to prevent competing railroads from entering into *ultra vires* contracts, leases or agreements, or from doing other illegal acts, which would result in stifling competition between them to the consequent injury of the public. Thus, the attorney-general, proceeding upon behalf of the state, may enjoin two railroads from entering into a contract which was designed for the purpose of securing to the contracting companies a monopoly of the coal business of the state.<sup>81</sup> So the state may enjoin one railroad from acquiring control of a parallel line of another railroad contrary to the provisions of the state constitution.<sup>82</sup>

§ 621 *e.* **Injunction on behalf of railway against ticket brokers; parties.** A railway company may enjoin ticket brokers from engaging in the business of buying and sell-

<sup>79</sup> *Niemeyer v. Little Rock Junction R. Co.*, 43 Ark., 111.

<sup>80</sup> *Forbes v. Delashmutt*, 68 Iowa, 164, 26 N. W., 56.

<sup>81</sup> *Stockton v. Central R. Co.*, 50 N. J. Eq., 52, 24 Atl. 964, 17 L. R. A., 97. See this case also as to whether actual, threatened injury must be shown. And see, *post*, § 1229 *a.*

<sup>82</sup> *Louisville & N. R. Co. v. Commonwealth*, 97 Ky., 675, 31 S. W.,

476, affirmed in 161 U. S., 677, 16 Sup. Ct. Rep., 714. In this case the defendant was enjoined from acquiring possession or control of the property or franchises of the parallel road; from bidding for them or becoming interested in bidding for them at any judicial sale; and from becoming *cestui que trust* of any trustee who might purchase or acquire the same.

ing the unused portions of railroad tickets which have been sold to passengers who, in consideration of the reduced rate at which they have been sold, have agreed that they should be good only in the hands of the original purchasers and that they would not sell or transfer them to other persons. In such case the legal remedy is regarded as inadequate and the relief is granted to prevent a multiplicity of suits.<sup>83</sup> And it is proper to join as defendants in one action numerous brokers who are all engaged in the same business and who have a common and immediate interest in the questions of law and fact involved, where the convenience of all parties is promoted by such a joinder.<sup>84</sup>

<sup>83</sup> *Schubach v. McDonald*, 179 Man., 128 Fed., 176; *Illinois Central Mo.*, 163, 78 S. W., 1020, 65 L. R. *tral R. Co. v. Caffrey*, 128 Fed., A., 136; *Nashville, C. & St. L. R.* 770.  
<sup>84</sup> *Illinois Central R. Co. v. Caffrey*, 128 Fed., 770.  
*Co. v. McConnell*, 82 Fed., 65; *Louisville & N. R. Co. v. Bitter-*

## II. FAILURE TO COMPENSATE FOR RIGHT OF WAY.

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§ 622. **The general doctrine stated and illustrated; injury need not be irreparable.** The ground upon which the aid of equity is most frequently invoked to restrain the construction of railways is the neglect or refusal to make proper compensation for the land appropriated for the use of the road. The general rule applicable to cases of this nature is, that failure or omission to compensate the owner of land, or to tender compensation for damages incurred by locat-

ing a railroad over his premises, will authorize a court of equity to restrain proceedings until the damages are properly adjusted, or until just compensation is made.<sup>1</sup> The reasoning in support of the rule is found in the danger of such serious and irreparable injury resulting from the continuation of the work that the tardy process of courts of law would afford inadequate relief. An injunction is there-

<sup>1</sup> *Richards v. Des Moines V. R. Co.*, 18 Iowa, 259; *Sidener v. Norristown, etc., T. Co.*, 23 Ind., 623; *Commissioners v. Durham*, 43 Ill., 86; *Horton v. Hoyt*, 11 Iowa, 496; *Harness v. Chesapeake & O. C. Co.*, 1 Md. Ch., 248; *Ross v. Elizabeth-Town, etc., R. Co.*, 1 Green Ch., 422; *Powers v. Bears*, 12 Wis., 213; *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 10 C. E. Green, 384; *Folley v. City of Passaic*, 11 C. E. Green, 216; *Murdock v. Prospect P. & C. I. R. Co.*, 73 N. Y., 579; *Armstrong v. Waterford & L. R. Co.*, 10 Ir. Eq., 60; *Western Maryland R. Co. v. Owings*, 15 Md., 199; *Carpenter v. Grisham*, 59 Mo., 247; *Bohlman v. Green Bay & L. P. R. Co.*, 30 Wis., 105; *Bohlman v. Green Bay & M. R. Co.*, 40 Wis., 157; *Stevens v. Erie R. Co.*, 6 C. E. Green, 259; *Cobb v. Illinois & St. L. R. Co.*, 68 Ill., 233; *Southern R. Co. v. B. S. & N. O. R. Co.*, 131 Ala., 663, 29 So., 191; *Hodges v. S. & R. R. Co.*, 88 Va., 653, 14 S. E., 380; *Pratt v. Roseland R. Co.*, 50 N. J. Eq., 150, 24 Atl., 1027. And see *Browning v. Camden & A. R. Co.*, 3 Green Ch., 47; *Bonaparte v. Camden & A. R. Co.*, *Baldw.*, 227; *Perice v. Wallis*, 37 Miss., 172; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md., 537; *Bensley v. Mount ain*, 13 Cal., 306; *Midland R. Co. v. Smith*, 113 Ind., 233, 15 N. E., 256; *Lake Erie & W. R. Co. v. Michener*, 117 Ind., 465, 20 N. E., 254; *Northern Pacific R. Co. v. Burlington & M. R. Co.*, 2 McCrary, 203; S. C., 4 Fed., 298; *East & West R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala., 275; *Coyne v. Warrior S. Ry.*, 137 Ala., 553, 34 So., 1004. And it was stated by Lord Cottingham, in a recent English case, to be most essential to the interest of the public that such jurisdiction should exist and should be exercised whenever a proper case for it is brought before the court, "otherwise the result may be, that after your house has been pulled down, and a railway substituted in its place, you may have the satisfaction, at a future period, of discovering that the railway company were wrong." *River Dun N. Co. v. North M. R. Co.*, 1 Railway Cases, 135. See as to the effect upon the right to an injunction, of a transfer of title to the land in controversy to a rival company or to a person acting at the instigation of a rival company, *Piedmont & C. R. Co. v. Speelman*, 67 Md., 260, and *Ocean City R. Co. v. Bray*, 57 N. J. Eq., 164, 37 Atl., 604.

fore regarded as the most appropriate and efficient remedy for the protection of the rights assailed, and for the prevention of such irreparable injury as would be likely to result from a continuance of the proposed work.<sup>2</sup> Where, therefore, a railway company claims and is attempting to exercise the right of entering upon real estate for the construction of its road, under color of law, but without having complied with the requirements of the statute, an injunction will be allowed to prevent further proceedings.<sup>3</sup> And an injunction may be granted to prevent a railway from further occupancy of land for which it has not made compensation, even though the company has actually tendered an amount agreed upon by arbitrators chosen under a statute held to be unconstitutional.<sup>4</sup> And the rule is

<sup>2</sup> *Sidener v. Norristown*, 23 Ind., 623.

<sup>3</sup> *Browning v. Camden & A. R. Co.*, 3 Green Ch. 47; *Bonaparte v. Camden & A. R. Co.*, Baldw., 227; *Armstrong v. Waterford & L. R. Co.*, 10 Ir. Eq., 60. The grounds upon which courts of equity interfere to prevent railway companies from illegally appropriating private property have been well stated as follows: "The injury complained of as impending over his (complainant's) property is its permanent occupation and appropriation to a continuing public use which requires the divestiture of his whole right, its transfer to the company in full property, and his inheritance to be destroyed as effectually as if he had never been its proprietor. No damages can restore him to his former condition; its value to him is not money, which money can replace; nor can there be any specific com-

pensation or equivalent; his damages are not pecuniary, *vide* 7 Johns. Ch., 731; his objects in making his establishment were not profit, but repose, seclusion, and a resting place for himself and family. If these objects are about to be defeated; if his rights of property are about to be destroyed without the authority of law; or if lawless danger impends over them by persons acting under color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission." Baldwin, J., in *Bonaparte v. Camden & A. R. Co.*, Baldw., 231.

<sup>4</sup> *Powers v. Bears*, 12 Wis., 213. And see *Shepardson v. Milwaukee B. & R. Co.*, 6 Wis., 605.



well established that courts of equity may properly interfere in cases of this kind without reference to the question whether the injury complained of is irreparable in its nature.<sup>5</sup> And the owner of land which is being taken by a railway company for the location of its road, without his consent and without making or tendering compensation, is entitled to an injunction, *ex debito justitiæ*.<sup>6</sup> Nor is it necessary that there should be any threat or declared intention on the part of the railway company to go on with the work, if it is doing preparatory acts indicating an intention to proceed.<sup>7</sup> And where a railway company has been enjoined from the use of land without having made payment or tender of damages as provided in its charter, and without the consent of the owner, the injunction will not

<sup>5</sup> *Western Md. R. Co. v. Owings*, 15 Md., 199; *American Tel. & T. Co. v. Pearce*, 71 Md., 535, 7 L. R. A., 200; *S. C. cited as American Tel. & T. Co. v. Smith*, 18 Atl., 910; *Pratt v. Roseland R. Co.*, 50 N. J. Eq., 150, 24 Atl., 1027; *Hodges v. S. & R. R. Co.*, 88 Va., 653, 14 S. E., 380; *Birmingham T. Co. v. Birmingham R. & E. Co.*, 119 Ala., 129, 24 So., 368; *Same v. Same*, 119 Ala., 137, 24 So., 502, 43 L. R. A., 233; *Southern R. Co. v. B., S. & N. O. R. Co.*, 131 Ala., 663, 29 So., 191. And see *dicta* to the same effect in *East & West R. Co. v. East Tennessee V. & G. R. Co.*, 75 Ala., 275, and *Coyne v. Warrior S. Ry.*, 137 Ala., 553, 34 So., 1004. In *Pratt v. Roseland R. Co.*, 50 N. J. Eq., 150, 24 Atl., 1027, *supra*, the court says: "It is obvious that if this were a suit between private persons, involving nothing but strictly private rights, no injunction could be granted, for the rea-

son that no irreparable present damage is shown, nor is it at all certain that any ever will be done. But a widely different rule prevails in cases where a corporation, having authority to take land on condition that it shall pay for the land before appropriating it, attempts to appropriate the land to its own use against the will of its owner but without paying for it. In that class of cases no irreparable damage need be shown but the court will exercise its prohibitory power as soon as it is made to appear that the corporation is attempting to appropriate the land against the will of its owner contrary to the terms of its charter." And see, *post*, § 1273.

<sup>6</sup> *Bohlman v. Green Bay & M. R. Co.*, 40 Wis., 157.

<sup>7</sup> *Bonaparte v. Camden & A. R. Co.*, Baldw., 227; *New Orleans M. & C. R. Co. v. Frederic*, 46 Miss., 1.

usually be dissolved on motion before a hearing upon the merits.<sup>8</sup> And a street railway company which owns its right of way may enjoin another street railway company from crossing such right of way until condemnation and proper compensation.<sup>9</sup> And upon the same principle as those which govern the granting of injunctions against railways in such cases, relief may be allowed to restrain a telegraph company from constructing its line over plaintiff's land until condemnation is had and proper compensation made.<sup>10</sup>

§ 623. **Further illustrations.** In conformity with the general principles laid down in the preceding section, it is held that where a railway company neglects and refuses to pay the damages properly assessed against it for the right of way over complainant's land, and proceeds to construct its road over complainant's premises, or continues to operate its road over the land in question, an injunction will be allowed until payment has been made of the damages assessed.<sup>11</sup> And where the company is proceeding, under claim and color of right, to permanently locate its road over one's land without having made any compensation therefor, equity will interpose to prevent the construction of the road.<sup>12</sup> So the construction of a railway track upon one's land without making compensation therefor and without condemning the right of way, and without the owner's permission, may be enjoined as an irreparable injury, especially when the digging and removal of the sand and soil will endanger complainant's property by turning the current of a river over his land.<sup>13</sup>

<sup>8</sup> *Ross v. Elizabeth-Town R. Co.*, 1 Green Ch., 422.

<sup>9</sup> *Birmingham T. Co. v. Birmingham R. & E. Co.*, 119 Ala., 129, 24 So., 368.

<sup>10</sup> *American Tel. & T. Co. v. Pearce*, 71 Md., 535, 7 L. R. A., 200; *S. C. cited as American Tel. & T. Co. v. Smith*, 18 Atl., 910.

<sup>11</sup> *Richards v. Des Moines V. R. Co.*, 18 Iowa, 259; *Freshwater v. Pittsburg, W. & K. R. Co.*, 6 West Va., 503.

<sup>12</sup> *Sidener v. Norristown T. Co.*, 23 Ind., 623. And see *Stevens v. Erie R. Co.*, 6 C. E. Green, 259.

<sup>13</sup> *Cobb v. Illinois & St. Louis R.*

§ 624. **Statutory remedy to be first exhausted.** The general doctrine as above stated is to be accepted with this qualification: that where a statutory remedy is provided for obtaining damages for private property taken in the construction of roads or railways, or for the relief of such persons as consider themselves aggrieved in the assessment of damages for their property taken, such statutory remedy must first be exhausted before equity will extend its protection.<sup>14</sup> Thus, where a statute provides a mode of obtaining damages for property taken for the use and construction of a railway, but the owner of the land has neglected to avail himself of the mode of relief thus pointed out, he will not be allowed to enjoin the construction of the road because of the non-payment of damages.<sup>15</sup>

§ 625. **When occupation or use of road enjoined.** So jealous are courts of equity in protecting the rights of land owners against the unauthorized occupation of their premises in the construction of railways, without just compensation being first made therefor, that the preventive relief in this class of cases is frequently extended to restraining the further occupation of the premises or the operation of the road after its construction.<sup>16</sup> Thus, where a railway company is wrongfully in possession of complainant's prem-

Co., 68 Ill., 233. And it is said by the court, *obiter*, that an injunction may also go in such case upon the ground that the company in doing the act complained of is exercising power not conferred by its charter.

<sup>14</sup> Nichols v. Salem, 14 Gray, 490; New Albany & S. R. Co. v. Connelly, 7 Ind., 32. And see Parham v. Justices, 9 Ga., 341.

<sup>15</sup> New Albany & S. R. Co. v. Connelly, 7 Ind., 32.

<sup>16</sup> Richards v. Des Moines Valley

R. Co., 18 Iowa, 259; Hibbs v. Chicago & S. W. R. Co., 39 Iowa, 340; Murdock v. Prospect P. & C. I. R. Co., 73 N. Y., 579; Evans v. Missouri, I. & N. R. Co., 64 Mo., 453; Perks v. Wycombe R. Co., 3 Gif., 662; White v. Nashville & N. R. Co., 7 Heisk., 518; Provolt v. Chicago, R. I. & P. R. Co., 69 Mo., 633; Kendall v. Missisquoi & C. R. Co., 55 Vt., 438; Stolze v. M. & L. W. R. Co., 104 Wis., 47, 80 N. W., 68. See also Kittell v. Missisquoi R. Co., 56 Vt., 96.

ises, having taken possession and constructed its road without title, it may be enjoined from longer continuing in possession or carrying on its works until proper compensation is ascertained and paid.<sup>17</sup> So it is proper to restrain the continuous unlawful use of plaintiff's land by operating a railroad over it, when the defendant company has not taken the necessary proceedings to acquire title under the laws of the state, and when it has no grant from plaintiff and no right to the occupancy of his premises.<sup>18</sup> And after proceedings have been instituted by a railway company for the condemnation of land for its right of way, the lessee of the company may be enjoined from operating its road over the land condemned until payment of the damages is made, since the lessee can acquire no greater rights than were enjoyed by the lessor.<sup>19</sup>

§ 626. **Injunction allowed on failure to pay judgment; laches.** It is also held, where the charter of a railway company authorizes it, upon deposit or tender of the amount found due by the commissioners to the land owner for the condemnation of his land, to proceed with the construction of its road, and the company makes such deposit, but the land owner excepts to the report of the commissioners and procures another assessment of damages and judgment thereon, the railway company having in the meantime completed its road over the premises and being insolvent, that the company may be enjoined from operating its road in default of payment of the judgment. Under such circumstances, the land owner, having fully exhausted the statutory method of obtaining redress, is properly entitled to the aid of equity for his protection.<sup>20</sup> But where, notwithstand-

<sup>17</sup> *Perks v. Wycombe R. Co.*, 3 Gif., 662.

<sup>18</sup> *Murdock v. Prospect P. & C. I. R. Co.*, 73 N. Y., 579.

<sup>19</sup> *Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa, 340.

<sup>20</sup> *Evans v. Missouri, I. & N. R. Co.*, 64 Mo., 453. See also *Provolt v. Chicago, R. I. & P. R. Co.*, 69 Mo., 633; *Gammage v. Georgia*

*Southern R. Co.*, 65 Ga., 614.

ing the failure or refusal of the railroad to pay the judgment rendered against it, the land owner has permitted it to take forcible possession of his land and to construct its road and to operate it four years before seeking to enjoin, the right to the relief will be barred by the owners laches as against the superior rights of the public.<sup>21</sup>

§ 627. **Specific performance of vendor's lien.** In an action by the vendor of lands which have been sold to a railway company for the purposes of its road to enforce specific performance of the agreement and for a vendor's lien upon the premises sold, equity will not grant an injunction before the hearing to restrain defendant from operating its road over the premises in question.<sup>22</sup> Such a case is regarded as being an appropriate one for the appointment of a receiver rather than for relief by injunction. And the land owner having obtained a decree for the specific performance of the contract of sale, and declaring his vendor's lien upon the premises for the balance of unpaid purchase-money, while he will not be allowed to enjoin the company from running its cars over the land or from using it, may have a receiver to preserve the property and render it profitable for the benefit of all parties in interest, the company being insolvent.<sup>23</sup> Where, however, the land has become unsalable, a vendor who has obtained a decree against an insolvent company for the enforcement of his vendor's lien may restrain the company from operating the road or continuing in possession of the land, in default of payment of the amount due.<sup>24</sup>

§ 628. **Requisites of bill.** Although the right of a land owner to restrain a railway company from taking perma-

<sup>21</sup> *Midland R. Co. v. Smith*, 135 100; *Munns v. Isle of Wight R. Co.*,  
Ind., 348, 35 N. E., 284. L. R. 5 Ch., 414.

<sup>22</sup> *Latimer v. Aylesbury & B. R.* <sup>23</sup> *Munns v. Isle of Wight R. Co.*,  
Co., 9 Ch. D., 385; *Pell v. North-* L. R. 5 Ch., 414.

*ampton & B. R. Co.*, L. R. 2 Ch., <sup>24</sup> *Allgood v. Merrybent & D. R.*  
Co., 33 Ch. D., 571.



ment possession of his land without a legal determination of the amount due him as compensation, and without tender or payment of such amount, is unquestioned, yet to entitle him to such relief it must clearly appear that the company threatens or intends to take possession of the land without such payment. And when a bill is lacking in such averment it can not be supported by the court by inference, and a demurrer because of such omission will be sustained.<sup>25</sup>

§ 629. **Contest as to title, injunction denied.** Nor will relief by injunction be granted in the class of cases under consideration, when the question involved is a mere naked question of adverse title between the parties. Where, therefore, the railway company itself claims title to the land in controversy, an injunction will be denied when it is not shown that an action of ejectment or trespass will not afford all necessary relief.<sup>26</sup> So where a railway company, acting in good faith and by permission of the person in possession and claiming title as devisee for life of real estate, has entered upon the premises and constructed the greater part of its road-bed, it will not be enjoined from proceeding at the suit of persons claiming as remainder-men, but whose title is disputed, the railway company offering to deposit in court a sufficient sum to compensate complainants for any interest they may have in the premises.<sup>27</sup> And a preliminary injunction is properly dissolved where the defendant proves title and possession to the *locus in quo*, while the plaintiff offers no proof either of title or of possession.<sup>28</sup>

§ 630. **Construction of second track; injunction denied when remedy in ejectment.** Where a railway company has constructed its track over complainants' premises without

<sup>25</sup> *Deidrichs v. The Northwest-Covington & M. R. Co.*, 77 Ga., 322, 2 S. E., 555.  
*ern Union R. Co.*, 33 Wis., 219;

*East & West R. Co. v. East Tennessee, V. & G. R. Co.*, 75 Ala., 275. <sup>27</sup> *Lantermann v. Blairstown R. Co.*, 28 N. J. Eq. (1 Stew.), 1.

<sup>26</sup> *Webster v. South-Eastern R. Co.*, 1 Sim. N. S., 272; *Davis v. R. Co.*, 129 Pa. St., 109, 18 Atl., 563. <sup>28</sup> *Patterson v. Scranton & F. C. R. Co.*, 129 Pa. St., 109, 18 Atl., 563.

authority, and is about to construct another track over the same premises, also without authority, and without having made compensation therefor to the owner, an injunction will be granted to restrain the construction of the second track. But in such case, the first track being already completed and the cars running thereon, an injunction will not be granted to prevent the cars from running when an action of ejectment and for mesne profits will afford ample relief.<sup>29</sup>

§ 631. **The doctrine in West Virginia.** The right to relief in the class of cases under consideration is sometimes affected by legislation. Thus, in West Virginia it is held under the statutes of the state that an injunction will not lie at the suit of a property owner to restrain the operations of a railway company charged with having entered upon and taken possession of plaintiffs' land without authority, when it is not averred that the company at the time of filing the bill was transcending its authority or was about to do so, or that it was insolvent or about to do an injury to plaintiffs' property which could not be compensated in damages.<sup>30</sup>

§ 632. **Effect of contract as a bar to injunction.** While the jurisdiction of equity to prevent by injunction the use of private property for railroad purposes without compensation is, as we have already seen, freely exercised, a different case is presented when the owner has contracted to convey a right of way to the railway company, and no breach of the contract has occurred on the part of the company. In such case, the owner of the land by his contract of sale waives his constitutional right to insist upon compensation before his land is taken, and he will be held to abide by the terms of his contract when there has been no breach upon the part

<sup>29</sup> *Stevens v. Erie R. Co.*, 6 C. E. Same *v. Bobbett*, *Id.*, 138. See, as Green, 259. to the governing statute in such

<sup>30</sup> *Chesapeake & O. R. Co. v. Pat-* case, Code of West Virginia, ch. ton, 5 West Va., 234. And see 42, sec. 20.

of the railway company. Where, therefore, a land owner has contracted to convey a right of way to a railway company upon certain conditions and has put the company into possession and it is proceeding with the construction of its line, it will not be enjoined by the owner from the use of the land when it has not violated any of the conditions of the contract.<sup>31</sup>

§ 633. **Non-compliance with contract by company no ground for injunction.** So, also, the non-compliance by a railway company with its contract for the payment of damages to the owner of the land, who has voluntarily conveyed the right of way to the company upon its promise to pay, constitutes no sufficient ground for an injunction, even under a statute authorizing injunctions against railways to prevent their use of private property without compensation.<sup>32</sup> Such a statute is to be construed as applying only to cases where the property is appropriated by the road without consent of the owner, and he having voluntarily conveyed the right of way is barred from asserting his claim to relief in equity, the remedy being at law upon the agreement of the company to pay for the land taken.<sup>33</sup> So where the owner of real estate has permitted a railway company to take possession of and to construct its road over his land, taking from the company a bond for the payment of the purchase money at a given day, the owner will not be allowed to enjoin the company from continuing in possession upon a failure to pay the bond.<sup>34</sup> And it may be laid down as a general rule that the violation or non-performance by a railway company of its contracts with reference to the construction of its road constitutes no ground for the interference of equity to restrain such construction. In all such

<sup>31</sup> *Baltimore R. Co. v. Highland*,      <sup>33</sup> *Id.*

48 Ind., 381.

<sup>34</sup> *Pell v. Northampton & B. J.*

<sup>32</sup> *Vilas v. Milwaukee & M. R. R. Co.*, L. R. 2 Ch., 100.

*Co.*, 15 Wis., 233.

cases the remedy at law for violation of contract is ample, and equity will not entertain jurisdiction.<sup>35</sup>

§ 634. **Further considerations as to effect of contracts.** It is also held, where a railroad company has entered upon and taken possession of real property under a license or contract from the owner, that it may enjoin him from retaking possession of the premises, even though the company has not complied with its contract as to the consideration for the license or privilege; although the injunction, in such case, will not be permitted to prejudice the rights of the grantor of the premises to a specific performance of the contract.<sup>36</sup> And where a railway company has received from a land owner a contract to convey a right of way, and the company has fully complied with the contract on its part, it is entitled to maintain a bill for specific performance. And upon such bill it may have the aid of an injunction to restrain the grantor from proceeding at law to procure an assessment of damages for the right of way.<sup>37</sup> Where, however, a railway company has agreed with the owner to submit the question of damages for property taken to arbitration, it will not be permitted to enjoin him from asserting and exercising his ownership over the premises so long as it is in default in the payment of the sum agreed upon by the arbitrators; in such case the company will itself be enjoined from using the premises until the amount is paid.<sup>38</sup> And when a land owner grants to a railway company the right to construct its road across his land, without defining the limits of such right of way, and the company locates its road upon a given route through such land, such selection and use, acquiesced in by the grantor, will be held equivalent to fixing the exact location of the right of way granted.

<sup>35</sup> *Gallagher v. Fayette Co. R. Co.*, 38 Pa. St., 102.

<sup>36</sup> *Williamston & T. R. Co. v. Battle*, 66 N. C., 540.

<sup>37</sup> *Chicago & S. W. R. Co. v. Swinney*, 38 Iowa, 182.

<sup>38</sup> *Stewart v. Raymond R. Co.*, 15 Miss., 568.

In such case, the company or its successors may be restrained from afterward taking without compensation another portion of the land not embraced in such selection.<sup>39</sup>

§ 635. **Property owner on street, when entitled to injunction against construction of railway; joinder of owners as plaintiffs.** The doctrine of relief by injunction to prevent the taking of private property for a right of way, as thus far discussed, has relation only to an actual taking of property in the construction of a railway, and not to cases where the injury sustained consists in the construction of a railway through a public street and to the consequent injury resulting therefrom to lot owners abutting on such street. As regards the latter class of cases, while the adjudicated cases are far from harmonious, the rule may be considered as well established by the clear weight of authority, as well as upon principle, that adjacent proprietors, whose lands abut upon a street and who own the fee to the center of the street, subject only to the public easement for use as a highway, may enjoin a railway company from constructing and operating its road upon the street in front of their premises until due compensation has been made for the damages sustained. In such case, the dedication of the street by the owner to the public use as a highway is not a dedication to the use of the railway company, the two uses being essentially different. The railway company can not, therefore, build upon the highway without compensation to the owner, and the injury sustained by an attempt so to do being in the nature of a continuing trespass, an injunction is the appropriate remedy.<sup>40</sup> The owner of the fee in such

<sup>39</sup> Warner v. Railroad Co., 39 Barb., 494; Langabier v. Fairbury. Ohio St., 70. P. & N. R. Co., 64 Ill., 243; Bond

<sup>40</sup> Williams v. New York C. R. Co., 16 N. Y., 97, affirmed in Henderson v. New York Central R. Co., 78 N. Y., 423, affirming S. C., 17 Hun, 344; People v. Law, 34 Barb., 494; Langabier v. Fairbury. P. & N. R. Co., 64 Ill., 243; Bond v. Penn. Co., 171 Ill., 508, 49 N. E., 545; Davenport Bridge R. Co. v. Johnson, 188 Ill., 472, 59 N. E., 479; Rock Island & P. R. Co. v. Johnson, 204 Ill., 488, 68 N. E., 549;



case, having title to the center of the street, subject only to the public easement, the legislature can not appropriate the street to any other use, or subject it to any additional servitude, without compensation to the owner; and the construction and operation of a railway through the street in front of complainant's premises, without his authority and without making compensation for the damages, is such an additional servitude, which equity may enjoin.<sup>41</sup> So a property holder upon a street in an incorporated town may have an injunction to prevent a railway company from taking forcible possession of the street and laying its track thereon, without having taken any measures to pay or estimate the damages for the injury resulting to complainant from such occupancy of the street, the bill showing that the railway will greatly injure and depreciate complainant's property.<sup>42</sup> And since the interests of abutting owners are common and there is but a single object to be accomplished by

*Harrington v. St. Paul & S. C. R. Co.*, 17 Minn., 215; *Street Railway v. Cummins*, 14 Ohio St., 523; *Railway Co. v. Lawrence*, 38 Ohio St., 41; *Mikesell v. Durkee*, 34 Kan., 509, 9 Pac., 278; *Hodges v. S. & R. R. Co.*, 88 Va., 653, 14 S. E., 380. But see, *contra*, *Spencer v. Point Pleasant & O. R. R. Co.*, 23 West Va., 406; *Campbell v. Point Pleasant & O. R. R. Co.*, 23 West Va., 448; *Smith v. Point Pleasant & O. R. R. Co.*, 23 West Va., 451; *Hale v. Point Pleasant & O. R. R. Co.*, 23 West Va., 454; *Texas & Pacific R. Co. v. Rosedale Street R. Co.*, 64 Tex., 80; *Buchner v. Chicago, M. & N. R. Co.*, 56 Wis., 403, 14 N. W., 273. And see *Gray v. First Division St. P. & P. R. Co.*, 13 Minn., 315; *Hodges v. Baltimore U. P. R. Co.*, 58 Md., 603;

*Riedinger v. Marquette & Western R. Co.*, 62 Mich., 29, 28 N. W., 775; *Ward v. Detroit, M. & M. R. Co.*, 62 Mich., 46, 28 N. W., 775, 785; *Dubach v. Hannibal & St. J. R. Co.*, 89 Mo., 483, 1 S. W., 86; *O'Connell v. Chicago T. T. Co.*, 184 Ill., 308, 56 N. E., 355.

<sup>41</sup> *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn., 215. And in this case, the facts found by the court upon the hearing showing that the operation of the road was a nuisance in fact to the adjacent proprietors, a conditional injunction was granted against the operation of the road, the injunction to issue if the company did not forthwith institute and promptly prosecute proceedings for condemnation.

<sup>42</sup> *Langabier v. Fairbury, P. & N. R. Co.*, 64 Ill., 243.

all, they may unite as co-complainants in a single bill for an injunction.<sup>43</sup>

§ 636. **Restrictions upon the doctrine.** Where, however, the railway company has been induced to construct its road through a street in front of complainant's premises by his express consent and license, and has expended large sums of money in such construction, he will not be permitted to enjoin the operation of the road.<sup>44</sup> And in cases of this nature the relief is allowed only in behalf of the property holders themselves, and the people, being the aggregate body politic, having no property traversed by the line of the proposed road, and therefore having no property rights to be protected, are not entitled to relief by injunction.<sup>45</sup> So when the owner of a lot abutting on a public street, who owns the fee to the center of the street, subject to the public easement, seeks to restrain a railway company from operating its line in front of his premises until it shall have made compensation, the relief will not be allowed when it is not alleged that the company claims or asserts a right to the use of the soil.<sup>46</sup> Nor will the relief be granted upon mere general allegations of irreparable injury, but such facts must be stated as to show that the apprehensions of injury are well founded.<sup>47</sup> So it is essential that the property owner should be prompt in availing himself of his remedy; and when, with full knowledge of the facts, he delays applying for an injunction until after the track is laid and in operation, his own laches may estop him from relief.<sup>48</sup> And the court in this class of cases, balancing the relative convenience and inconvenience to the parties, has dissolved the injunction upon the depositing by defendant of a suf-

<sup>43</sup> *Taylor v. Bay City S. R. Co.*, Ind., 178; *Roelker v. St. Louis R. Co.*, 50 Ind., 127.  
80 Mich., 77, 45 N. W., 335.

<sup>44</sup> *Murdock v. Prospect Park & C. I. R. Co.*, 10 Hun, 598. <sup>47</sup> *Payne v. McKinley*, 54 Cal., 532.

<sup>45</sup> *People v. Law*, 34 Barb., 494.

<sup>48</sup> *Osborne & Co. v. Missouri Pacific R. Co.*, 37 Fed., 830.

<sup>46</sup> *Cox v. Louisville R. Co.*, 48

ficient sum in court to indemnify plaintiff for the probable injury to his property.<sup>49</sup> And where the court, considering the relative convenience and inconvenience of the parties, concludes from the averments of the answer that the benefit to the plaintiff arising from a preliminary injunction would be slight as compared with the injury to the public resulting from the granting of the writ, a preliminary injunction is properly dissolved; but inasmuch as the defendant may not be able to sustain the allegations of his answer by proof, it is erroneous for the court, upon dissolving the injunction, to dismiss the bill for want of equity.<sup>50</sup>

§ 637. **Distinction as to ownership of fee in street.** A distinction is also taken between cases where the lot owner adjacent to a street owns the fee to the center of the street, subject only to the public easement or servitude, and cases where the fee of the street is in the municipality and where permission or license has been duly obtained from the municipal government to construct a railway through the street. And while it is conceded that in the former class of cases equity may properly enjoin the construction of a railway through the street, at the suit of an abutting property owner, in the latter class the relief will be withheld. Where, therefore, the fee of the street is in the municipal corporation and not in the lot owner abutting upon the street, he can not enjoin the use of the street in front of his premises in the construction or operation of a railway because of non-payment of damages sustained by him, when such use of the street is authorized by the charter of the railway company and by permission of the municipal authorities.<sup>51</sup> And when

<sup>49</sup> *Columbus & Western R. Co. v. I. R. Co. v. Schertz*, 84 Ill., 135; *Witherow*, 82 Ala., 190, 3 So., 23. *Mills v. Parlin*, 106 Ill., 60; *Penn*

<sup>50</sup> *Mobile & M. R. Co. v. Ala. M. Mutual Life Ins. Co. v. Heiss*, 141 R. Co., 116 Ala., 51, 23 So., 57. Ill., 35, 31 N. E., 138, 33 Am. St.

<sup>51</sup> *Stetson v. Chicago & E. R. Co.*, Rep., 273; *Corcoran v. C., M. & N.* 75 Ill., 74; *Patterson v. Chicago, D. R. Co.*, 149 Ill., 291, 37 N. E., 68; & *V. R. Co.*, *Ib.*, 588; *Peoria & R. Osborne v. Missouri Pacific R. Co.*,

a railway company is about to build a side track in a street, in front of its own premises, under a proposed ordinance from the city, the owners of property located in the vicinity but not abutting upon the proposed improvement can not enjoin such construction, but will be left to their remedy in damages in an action at law.<sup>52</sup>

§ 638. **Abandonment of award, effect of.** Where commissioners have made an appraisalment and an award of damages to the property owner for injuries to his land about to be taken for the use of a railway, and an agreement of settlement is effected upon the basis of such award, but the award is based upon a plan of construction which is subsequently changed and abandoned by the company, and a new plan is adopted resulting in much greater injury to complainant's premises, he is entitled to an injunction against the construction of the road as proposed until due compensation shall be made for the increased damage resulting from the change of plan.<sup>53</sup>

§ 639. **Notice of meeting of commissioners necessary.** Under statutory proceedings to fix the amount of compensation for land taken by a railway company in the construction of its road, it is held that notice to the land owners of the time and place of meeting of commissioners appointed by law to determine the amount of compensation is necessary. And a failure upon the part of the railway company to give such notice is, therefore, held to afford sufficient ground for enjoining the railway company from proceeding to acquire the lands.<sup>54</sup> But a property owner can not enjoin a railway company from taking possession of his land and constructing its road thereon, because of want of notice

147 U. S., 248, 13 Sup. Ct. Rep., 299; *Burrus v. City of Columbus*, 9 C. E. Green, 249.

105 Ga., 42, 31 S. E., 124.

<sup>52</sup> *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill., 561.

<sup>53</sup> *Carpenter v. Easton & A. R. Co.*, 9 C. E. Green, 249.

<sup>54</sup> *New Orleans, M. & C. R. Co. v. Frederic*, 46 Miss., 1. But see *Wilson v. Baltimore & P. R. Co.*, 5 Del. Ch., 524.

of the condemnation proceedings, when although he had no notice of the original proceeding, he nevertheless appealed from the judgment, since such appeal is held to operate as a waiver of the defect as to the jurisdiction of his person.<sup>55</sup>

§ 640. **Failure to construct cattle gaps.** Where the owner of lands has conveyed to a railway company a right of way through his premises, upon a verbal assurance that the company would construct the necessary "cattle gaps" for the passage of cattle, a failure on the part of the company to comply with such agreement will not warrant an injunction to prevent the operation of its road until the agreement is complied with, since the indirect effect of such relief would be to compel the company to construct the cattle gaps, and the power thus to enforce a specific construction is one which is rarely exercised by a court of equity.<sup>56</sup>

§ 641. **Railway enjoined from taking land for subsidiary purposes.** It is also held, where a railway company is by its act of incorporation authorized to take and use such lands as are necessary for its railway purposes, that it is not thereby authorized to take compulsorily and permanently lands which are only to be used for subsidiary purposes, such as excavating materials therefrom for repairing and embanking its own road, or for the construction of a subsidiary road, and that an injunction may be granted to restrain the company from taking proceedings to procure such lands.<sup>57</sup>

§ 642. **Use of road by another company.** A land owner whose property has been taken by a railway company for the construction of its road, and who has obtained a judgment for damages therefor, is not entitled to enjoin another company, the successor of the former, from using the road.

<sup>55</sup> *Rheiner v. Union D. S. R. & T. Co.*, 31 Minn., 289, 17 N. W., 623.

<sup>56</sup> *Cook v. North & South R. Co.*, 46 Ga., 618.

<sup>57</sup> *Eversfield v. Mid-Sussex R. Co.*, 3 De Gex & J., 286, affirming S. C., 1 Gif., 153; *Dodd v. Salisbury & Y. R. Co.*, 1 Gif., 158.



And the reason for refusing the relief in such case is found in the fact that, if complainant still has title to the property, his remedy is in ejectment; and if he has no title, his judgment stands in lieu thereof, and he may pursue his legal remedy.<sup>58</sup> \* It has been held, however, that where a foreign railway company is using by sufferance the line of a domestic company, it may be enjoined from using that portion of the line running through plaintiff's land until the damages assessed for right of way are paid.<sup>59</sup>

§ 643. **Laches and acquiescence of property owner.** As in all cases of the exercise of the strong arm of equity by injunction, the right to the relief may be lost by one's own negligence and delay in seeking protection. And where the owner of land over which a railway has been constructed has stood quietly by and neglected to insist upon compensation at the time his land was taken, and has waited until the road was in full operation before asserting his rights, he will not be permitted to restrain its operation, his only remedy being to have his damages assessed and enforced against the railroad.<sup>60</sup> In such case an injunction, if granted at all, should only be allowed as a last resort, and after all

<sup>58</sup> Remshart *v.* The Savannah & Charleston R. Co., 54 Ga., 579.

<sup>59</sup> Holbert *v.* St. Louis, K. C. & N. R. Co., 45 Iowa, 23.

<sup>60</sup> Hentz *v.* Long Island R. Co., 13 Barb., 646; Erie R. Co. *v.* Delaware R. Co., 6 C. E. Green, 283; Goodin *v.* Cincinnati R. Co., 18 Ohio St., 169; Midland R. Co. *v.* Smith, 113 Ind., 233, 15 N. E., 256; Sherlock *v.* Louisville, N. A. & C. R. Co., 115 Ind., 22, 17 N. E., 171; Louisville, N. A. & C. R. Co. *v.* Beck, 119 Ind., 124, 21 N. E., 471; Porter *v.* Midland R. Co., 125 Ind., 476, 25 N. E., 556; Midland R. Co. *v.* Smith, 135 Ind., 348, 35 N. E., 284; Pensacola & A. R. Co. *v.* Jack-

son, 21 Fla., 146; Griffin *v.* Augusta & K. R. Co., 70 Ga., 164; Organ *v.* M. & L. R. Co., 51 Ark., 235, 11 S. W., 96. And in Goodin *v.* Cincinnati R. Co., 18 Ohio St., 169, the court say, Welch, J.: "Where a party stands by, as we must presume the plaintiffs to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums have been expended on the faith of his apparent acquiescence, to seek by injunction, or otherwise, to deny to the railroad company the right to use the property. Considerations of public

ordinary means of relief have proved ineffectual.<sup>61</sup> And where the owner of real estate has invited a railway company to enter upon his land and has promised a right of way, though his promise, being verbal, is not binding, yet if he allows the company to go on with the construction of its road, he can not afterward restrain the use of the track over his land until compensation is made.<sup>62</sup> And where a company has been permitted under claim of right for twenty years to occupy the street of a city fronting complainant's premises, without objection or remonstrance, and by such long acquiescence has been induced to enter into a contract with the city, binding itself to build a depot and platform in such manner as will cause but little inconvenience to complainant in addition to that arising from defendant's track, an injunction will not be granted to restrain the erection.<sup>63</sup> So a railway company has been allowed to enjoin the prosecution of an action of ejectment for a strip of land over which its road was constructed, the property owner having acquiesced in such construction and operation of the road for a period of twenty years.<sup>64</sup> And where a telegraph company had constructed its lines over the lands in question while they were owned by plaintiff's grantor, and plaintiff permitted more than two years to elapse after

policy, as well as recognized principles of justice between parties, require that we should hold in such cases that the property of the owner can not be reclaimed, and that there only remains to him a right of compensation. The injunction in the present case might have been sought at the first known attempt, or even threat to despoil the canal, or to construct the railroad upon its line. The omission to do so is an implied assent. The work being completed, the public, as well as those direct-

ly interested in the road, as stockholders and creditors, have a right to insist on the application of the rule that he who will not speak when he should, will not be allowed to speak when he would."

<sup>61</sup> *Hentz v. Long Island R. Co.*, 13 Barb., 646.

<sup>62</sup> *Pettibone v. La Crosse, etc.*, 14 Wis., 443.

<sup>63</sup> *Higbee v. Camden & A. R. & T. Co.*, 5 C. E. Green, 435.

<sup>64</sup> *Paterson, N. & N. Y. R. Co. v. Kamlah*, 42 N. J. Eq., 93, 6 Atl., 444.

acquiring title before seeking relief, his laches was held a sufficient bar to an injunction.<sup>65</sup> But where a railway company, after constructing its road upon plaintiff's land, has become hopelessly insolvent, mere delay or inaction upon the part of the plaintiff in not having sooner sought equitable relief will be no bar.<sup>66</sup>

§ 644. **Company not enjoined from condemnation proceedings.** Equity will not restrain a railway company from proceeding with an action in a court of competent jurisdiction to condemn lands for the use of its road, upon grounds of objection which are available and may be urged in the court in which the condemnation proceedings are pending; it being sufficient ground for refusing to interfere by injunction in such case that there is ample remedy at law.<sup>67</sup> Nor will a railway company be enjoined from prosecuting proceedings by condemnation to acquire title to real estate necessary for the purposes of its incorporation, in the exercise of the right of eminent domain, upon the ground of the unconstitutionality of the statute authorizing such right, when that question can be passed upon the adjudicated in the condemnation proceedings themselves before any injury can occur to the property holder.<sup>68</sup> So equity will not enjoin a sheriff from summoning a jury to assess damages under condemnation proceedings about to be instituted by a railway company upon the ground that the land sought to be condemned is already devoted to a public use, since that objection may be raised equally as well as a defense to the condemnation suit.<sup>69</sup> And the defendant land owner can not enjoin proceedings by a railway company to condemn land for the use of its road, upon the ground that the

<sup>65</sup> *Western Union Tel. Co. v. Judkins*, 75 Ala., 428.

<sup>66</sup> *Coombs v. S. L. & F. D. Co.*, 9 Utah, 322, 34 Pac., 248.

<sup>67</sup> *Western Maryland R. Co. v. Patterson*, 37 Md., 125; *President*,

*etc.*, *v. Baltimore, C. & E. M. P. R. Co.*, 81 Md., 247, 31 Atl., 854. And see, *ante*, § 90.

<sup>68</sup> *Kip v. New York & H. R. Co.*, 6 Hun, 24.

<sup>69</sup> *Waterloo W. Co. v. Hoxie*, 89 Iowa, 317, 56 N. W., 499.

company does not intend to build the road for which it is seeking to appropriate the lands, or because proceedings in *quo warranto* are pending against the company for the forfeiture of its franchise.<sup>70</sup>

§ 645. **Condemnation of one railway by another.** Upon similar principles it is held that where a railway company is seeking by proceedings under laws of the state to condemn lands of another company under the power of eminent domain, and the defendant company by its cross-bill seeks an injunction upon grounds which would constitute a legal defense to the condemnation proceedings upon the final hearing, the plaintiff company will not be restrained from entering upon or taking possession of the property which it seeks to condemn, and defendant will be left to make such defense upon the trial of the condemnation suit.<sup>71</sup> Nor will such proceedings be enjoined upon the alleged ground that the defendant is not acting in good faith for the purpose of constructing a railroad but is proceeding solely for the purpose of preventing plaintiff, another railroad company, from constructing its road over the land in question.<sup>72</sup> A railway company is, however, entitled to the protection of a court of equity by injunction to prevent another company from taking possession of complainant's right of way under a fraudulent proceeding for its condemnation, without making complainant a party thereto, and without making any compensation for the right of way so taken.<sup>73</sup>

§ 646. **Mill owners enjoined from flooding track.** An injunction is the appropriate remedy to protect a railway company in laying its track over lands which have been properly condemned, by restraining mill owners from keeping the water in their mill dam at such an unusual height as to

<sup>70</sup> *Aurora & Cincinnati R. Co. v. California & N. Ry. Co.*, 48 C. C. A., 517, Miller, 56 Ind., 88. 109 Fed., 509.

<sup>71</sup> *California Pacific R. Co. v. Central Pacific R. Co.*, 47 Cal., 549. <sup>73</sup> *Cincinnati, L. & C. R. Co. v. Danville & V. R. Co.*, 75 Ill., 113.

<sup>72</sup> *Eureka K. R. R. Co. v. Cali-*

flood complainant's track and to prevent its operations. And such an injunction, commanding the mill owners to refrain from raising the water beyond a specified height, is not regarded as a mandatory injunction.<sup>74</sup>

§ 647. **Abandoned road-bed.** Where plaintiff, a railway company, claims title to the road-bed of another company under a contract or a lease from the latter company, but has abandoned such road-bed for many years, and it has been in part inclosed and used by adjacent owners, and defendant, a railway company, under a claim of title from some of the adjacent owners, enters upon the road-bed and begins the work of grading and constructing track thereon, it will not be enjoined in the first instance at the suit of the plaintiff company, no injury being shown which can not be compensated in damages at law.<sup>75</sup>

§ 648. **Violation of contract by city.** When a railway company is given a right of way through the streets of a city, upon the undertaking that another company also desiring to lay its track upon the same streets shall be allowed to do so only upon paying the first company one-half the expense of grading, equity may enjoin the payment of the money by the second company to the city authorities in violation of the contract. And in such case the relief may be allowed at the suit of a receiver of the former road, a court of equity being in possession of the road and having jurisdiction to stop the fund.<sup>76</sup>

<sup>74</sup> Longwood V. R. Co. v. Baker, T. & W. R. Co., 13 Hun, 60.

<sup>12</sup> C. E. Green, 166.

<sup>76</sup> Southwestern R. Co. v. Screv.

<sup>76</sup> Troy & B. R. Co. v. Boston, H. en, 45 Ga., 613.



## CHAPTER XI.

### OF INJUNCTIONS AGAINST WASTE.

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#### I. ORIGIN AND NATURE OF THE JURISDICTION.

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§ 649. **The jurisdiction of recent origin; remedy at common law.** The jurisdiction of equity in restraining the com-

mission of waste is of comparatively modern origin and rests upon the necessity of preventing irremediable injury. At common law the mode of proceeding was by writ of prohibition issuing out of the Court of Chancery, which, if ineffectual, was followed by an original writ of attachment from the same source, returnable in the courts of common law. Originally this proceeding was confined to tenants in dower, tenants by curtesy, and guardians in chivalry, although it was afterward extended, by statute, to other persons.<sup>1</sup> The writ of estrepement was also a common law writ, whose purpose was the staying of waste in any action real, after judgment and before possession delivered. Its use, however, did not, at common law, extend to the case of waste committed by the tenant *pendente lite*, and it was not until the statute of Gloucester<sup>2</sup> that its use was enlarged to meet the case of waste pending the suit.<sup>3</sup> The writ of estrepement being confined to actions real, it became necessary, in cases of ejectment, to apply to equity to supply the deficiencies of the common law by restraining waste pending an action of ejectment to try the title, and this would seem to be the origin of the jurisdiction of equity in cases of waste.<sup>4</sup>

§ 650. **Distinction between waste and trespass.** The distinction between waste and trespass consists in the former being the abuse or the destructive use of property by one who, while not possessed of the absolute title thereto, has yet a right to its legitimate use; trespass being an injury to property by one who has no right whatever to its use. And an injunction issued pending the trial of the title at law in an action of trespass *quare clausum* is ancillary or auxiliary to the action at law and follows its fortunes. It follows,

<sup>1</sup> *Jefferson v. Bishop of Durham*, 3 3 Black. Com., 227, 228.

<sup>1</sup> Bos. & Pull., 120.

<sup>4</sup> 2 Story's Eq., § 911; 3 Black.

<sup>2</sup> 6 Edw. I., Ch. 13.

Com., 227, 228.

therefore, that when plaintiff recovers a general judgment in his action at law, the writ will be made perpetual.<sup>5</sup>

§ 651. **Plaintiff's title must be clear; cases where relief refused; facts must be alleged.** It may be laid down as a general rule that equity will not restrain waste except upon unquestioned evidence of complainant's title, and where defendant is in possession, under adverse title, the relief will be refused.<sup>6</sup> Nor will equity interfere by injunction to prevent waste when complainant's title is not clear, since the relief is granted only when the title is free from dispute.<sup>7</sup> And upon a motion for an injunction to stay waste a particular title must be shown by complainant.<sup>8</sup> And when there is grave doubt whether an action at law could be maintained for the alleged waste it is proper to refuse a preliminary injunction.<sup>9</sup> So when the question of the right to do the thing which it is sought to restrain as waste is doubtful and rests upon the construction of an act of parliament which is doubtful, equity will not grant the injunction in the first instance.<sup>10</sup> And when defendants are acting in good faith and for the public

<sup>5</sup> *Hill v. Bowie*, 1 Bland, 593.

<sup>6</sup> *Pillsworth v. Hopton*, 6 Ves., 51; *Davies v. Leo*, *ib.*, 784; *Talbot v. Hope Scott*, 4 Kay & J., 96; *Poindexter v. Henderson*, Walk. (Miss.), 177; *Nevitt v. Gillespie*, 1 How. (Miss.), 108. "I do not recollect," says Lord Eldon in *Pillsworth v. Hopton*, "that the court has ever granted an injunction against waste under any such circumstances: the defendant in possession: the tenants having attorned: the plaintiff having failed in his ejectment: both setting up pretenses of title. I remember perfectly being told from the bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to restrain

waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." The reporter adds: "His lordship having inquired if the bar knew any instance, and none being produced, would not make the order." See also *Wearin v. Munson*, 62 Iowa, 466. But see, *contra*, *Shubrick v. Guerard*, 2 Desaus. Eq., 616, note.

<sup>7</sup> *Lowe v. Lucey*, 1 Ir. Eq., 93; *Nethery v. Payne*, 71 Ga., 374.

<sup>8</sup> *Whitelegg v. Whitelegg*, 1 Browne C. C., 58.

<sup>9</sup> *Lurting v. Conn*, 1 Ir. Ch., 273; *Nethery v. Payne*, 71 Ga., 374.

<sup>10</sup> *Field v. Jackson*, Dick., 599.

benefit, under an act of incorporation from the state, they will not be enjoined while they do not exceed their corporate powers, even though they are committing great and lasting injury to complainant's estate.<sup>11</sup> Nor will an injunction be allowed where it does not appear that the injury will be destructive to the estate of inheritance or productive of irreparable mischief.<sup>12</sup> Nor will mere allegations of irreparable injury suffice, but the facts must be shown which go to constitute the injury alleged to be irreparable.<sup>13</sup> And where the injury complained of is susceptible of perfect pecuniary compensation, and one for which satisfaction in damages can be had at law, the injunction will be withheld.<sup>14</sup> So where the right to the premises is in doubt, pending an action of ejectment at law, the relief will not be granted, on the general principle that where the right is doubtful equity will not interfere.<sup>15</sup> And pending an action for the recovery of real property, the title being in dispute, equity will not restrain a defendant in possession from the ordinary and natural use and enjoyment of the premises.<sup>16</sup> And an injunction granted to stay waste pending an action of ejectment at law will be dissolved on denial of complainant's title, especially if he is negligent in trying the title at law.<sup>17</sup>

§ 652. **Title must be established at law.** The jurisdiction of equity in cases of waste is not in derogation of the jurisdiction of courts of law, but rather in aid of the legal right. Hence arises the limitation that it will be exercised only when complainant has established or is endeavoring to es-

<sup>11</sup> *Scudder v. Trenton, Saxt.*, 694.

<sup>15</sup> *Pillsworth v. Hopton*, 6 Ves.,

<sup>12</sup> *Hamilton v. Ely*, 4 Gill, 34;

51; *Field v. Jackson, Dickens*, 599;

*Amelung v. Seekamp*, 9 Gill & J., 468.

*Storm v. Mann*, 4 Johns. Ch., 21.

<sup>16</sup> *Snyder v. Hopkins*, 31 Kan.,

<sup>13</sup> *Bogey v. Shute*, 1 Jones Eq., 180.

557, 3 Pac., 367.

<sup>17</sup> *Higgins v. Woodward, Hopk.*,

<sup>14</sup> *Cockey v. Carroll*, 4 Md. Ch., 342.

344; *Amelung v. Seekamp*, 9 Gill & J., 468.

tablish his title at law. And on an application for an injunction, defendant being in exclusive possession under colorable title, equity will not sustain the legal estate in the absence of proceedings at law to try the title of complainant.<sup>18</sup> And where an injunction has been granted, the title being in dispute, it will be dissolved, no action at law having been undertaken to try the title.<sup>19</sup> Nor will the injunction be retained on the ground that one of the defendants has brought an action of trespass *quare clausum* against complainant to determine the legal title, since that is purely a legal question.<sup>20</sup>

§ 653. **Removal of improvements by defendants and insolvency.** But it has been held sufficient to sustain a bill for an injunction to stay waste and prevent the removal of improvements, that the bill alleges that complainant is the owner and entitled to the possession of the premises, with the improvements, and that defendants are in possession and threaten to destroy the improvements, and that they are insolvent and unable to respond in pecuniary damages.<sup>21</sup> And where a tenant for life is about to tear down a house for the purpose of erecting a new and better building, the remainderman is entitled to an injunction restraining such waste.<sup>22</sup>

<sup>18</sup> *Bogey v. Shute*, 4 Jones Eq., 174. In this case an injunction was sought on the ground of the insolvency of the defendant and injury to the substance of the estate by acts in the nature of destructive waste. The court, Ruffin, J., say: "Such a bill can not be sustained against one in exclusive possession—claiming, colorably at least, the absolute estate, until the plaintiff has established his title at law—or, at all events, an injunction can be granted only when the plaintiff is endeavoring to establish his title at law, and until he

should have a reasonable time allowed for that purpose. For the court of equity acts in such cases, not as superseding the jurisdiction of the courts of law over a legal title, but only in aid of a legal remedy, defective because dilatory."

<sup>19</sup> *Brown v. Folwell*, 3 Halst. Ch., 593.

<sup>20</sup> *Wright v. Grist*, 1 Busb. Eq., 203.

<sup>21</sup> *Meadow Valley M. Co. v. Dodds*, 6 Nev., 261.

<sup>22</sup> *Dooly v. Stringham*, 4 Utah, 107, 7 Pac., 405.



Where, however, defendant has given ample security for all damages which may be sustained by plaintiff in such case, an injunction will be withheld, there being an adequate remedy at law.<sup>23</sup>

§ 654. **Adverse possession; use of land pending ejectment.**

Where reliance is had upon adverse possession to warrant the interference, such possession must be accompanied with a positive and exclusive claim of the entire title. And if complainant's title be subordinate to, or admit the existence of a superior title, such possession, regardless of its duration, will not be held adverse, and equity will not interfere.<sup>24</sup> And pending an action of ejectment to try the title, defendant will not be restrained from using the land in the ordinary course of agriculture, and clearing off timber and erecting buildings for that purpose.<sup>25</sup>

§ 655. **Threats of waste sufficient; past waste.** To warrant the interference it is not essential that actual and serious waste should have been already committed;<sup>26</sup> although in general equity will only interfere to prevent future waste where complainant is remediless at law, or where a discovery is necessary.<sup>27</sup> And where the waste is trivial, equity will not interfere unless an intention to commit further waste is shown.<sup>28</sup> But if it can be shown that an intention exists to commit waste, or that threats of its commission have been made, the court may interfere.<sup>29</sup> And the fact that defendant denies the commission of waste since the filing of the bill will not prevent the granting of the injunction, when he has admitted that he has committed waste.<sup>30</sup> Nor is it sufficient to warrant the court in dissolving an injunction against waste that the defendant, in his

<sup>23</sup> *Campbell v. Coonradt*, 26 Kan., 67.

<sup>24</sup> *Dean v. Brown*, 23 Md., 11.

<sup>25</sup> *Thompson v. Williams*, 1 Jones Eq., 176.

<sup>26</sup> *Gibson v. Smith*, 2 Atk., 182.

<sup>27</sup> *Winship v. Pitts*, 3 Paige, 259.

<sup>28</sup> *Coffin v. Coffin*, Jac. 71.

<sup>29</sup> *Gibson v. Smith*, 2 Atk., 182.

<sup>30</sup> *Attorney-General v. Burrows*, Dick., 128.

answer, swears that he has not committed any waste since the filing of the bill, since as he admits the commission of waste before, the court will presume that he may do further waste, and will therefore continue the injunction.<sup>31</sup> Where, however, there is no claim of right to commit acts amounting to waste, and no intention to commit such acts, an injunction should not be granted merely because a tenant in possession had committed waste at some previous time.<sup>32</sup> And equity will not enjoin upon a bill charging the commission of past acts of waste only, when there is no averment of any future injury anticipated or threatened, since for past injuries an action at law for damages will afford the appropriate relief, and equity only enjoins because of a threatened injury in the future.<sup>33</sup>

§ 656. **Injunction not granted against stranger to the title.** It is an old and well established doctrine pertaining to the jurisdiction of equity by injunction against waste, that it is not exercised as against a stranger to the premises, without interest or title therein, or when no privity exists between the parties to the action, defendants being regarded in such cases as mere trespassers, and as such liable to an action of trespass at law.<sup>34</sup> Nor will equity interfere by injunction upon the ground of waste when defendant is a mere stranger, although he has been guilty of a forcible entry, since he may be immediately dispossessed, and equity will not, therefore, interfere.<sup>35</sup> So if the facts do not show privity of title, or irremediable injury, the injunction, if already granted, will be dissolved.<sup>36</sup> And one who has neither privity of estate nor possession, and who has neither

<sup>31</sup> Anon., 3 Atk., 485.

See also Congleton v. Mitchell, 12

<sup>32</sup> Crockett v. Crockett, 2 Ohio St., 180.

Ir. Eq., 45.

<sup>33</sup> Owen v. Ford, 49 Mo., 436.

<sup>35</sup> Mortimer v. Cottrell, 2 Cox, 205.

<sup>34</sup> Mogg v. Mogg, Dick., 670;

<sup>36</sup> Georges v. Detmold, 1 Md. Ch., 371.

Wrixon v. Condran, 1 Ir. Eq., 380.

established his title at law nor brought ejectment to try the title, is not entitled to an injunction.<sup>37</sup>

§ 657. **Relief against vendee in possession.** A vendor of real estate who retains title to the land as security for the purchase money may have an injunction against the vendee who is in possession and is committing waste where such action results in diminishing the value of the security and the vendee is alleged to be insolvent.<sup>38</sup> So in an action to foreclose a vendor's lien for unpaid purchase money it is proper to enjoin the vendee in possession from the commission of waste, when it is shown that he is insolvent, and has threatened to cut timber, to the material injury of the security.<sup>39</sup> So, where the vendee takes possession of the premises under a bond for title and remains in possession for a period of several years, receiving the rents and profits, but the premises are constantly depreciating in value by reason of bad husbandry upon the part of the vendee who is insolvent and in bankruptcy, the depreciation in value being such as to render the premises an inadequate security for the purchase money still due, the vendee may be enjoined from renting or using the land.<sup>40</sup>

§ 658. **Right of purchaser at judicial sale or of attaching creditor to injunction.** The authorities are somewhat conflicting as to the right of a purchaser of lands at a judicial sale, who has not yet received a conveyance under his purchase, to enjoin the commission of waste upon the premises. Upon the one hand, it is held that such a purchaser, whose only evidence of title is a certificate of sale, has no such interest or title as to enable him to maintain a bill for an injunction against waste before obtaining his deed, when

<sup>37</sup> *Blackwood v. Van Vleet*, 11 Mich., 252.

<sup>38</sup> *Moses Brothers v. Johnson*, 88 Ala., 517, 7 So., 146, 16 Am. St. Rep., 58.

<sup>39</sup> *McCaslin v. The State*, 44 Ind., 151.

<sup>40</sup> *Tufts v. Little*, 56 Ga., 139. See also *Gunby v. Thompson*, 56 Ga., 316; *Chappell v. Boyd*, *ib.*, 578.

under the statute regulating such sales the judgment debtor is allowed to retain title to and possession of the premises until the statutory period for redemption has expired. The rights of such a purchaser, it is held, are distinguishable from those of a mortgagee, who may restrain waste, since the mortgagee may be regarded as in the nature of a purchaser, the land mortgaged being specially appropriated to the payment of his debt and the waste lessening his security; but the purchaser at the judicial sale is only a volunteer, without privity with the owner, and equity accordingly leaves both to their legal rights and remedies.<sup>41</sup> Upon the other hand, it is held that it is not necessary that complainant seeking to restrain the commission of waste should have an absolute title in fee to the premises, but that an equitable title may suffice to warrant the interposition of equity. It is accordingly held, in conformity with this view of the nature of the title required, that a purchaser at a sheriff's sale may be allowed an injunction against the commission of waste by the cutting of timber to the serious injury of the premises, even before the sale has been confirmed and a conveyance executed to the purchaser.<sup>42</sup> Indeed, the jurisdiction has been extended even further, and it has been held that an attaching creditor is entitled to the relief for the protection of the estate which he has attached to satisfy his debt, the jurisdiction resting, as in the case of mortgages, upon the necessity of preventing the security from being diminished or impaired.<sup>43</sup> So where the sale of lands levied upon under execution has been staid by military order, and waste is being committed, it is competent

<sup>41</sup> *Law v. Wilgees*, 5 Bissell, 1.

<sup>42</sup> *Thompson v. Lynam*, 1 Del. Ch., 64. See also *Hughlett v. Harris*, 1 Del. Ch., 349.

<sup>43</sup> *Camp v. Bates*, 11 Conn., 51. In this case defendant being other-

wise insolvent, complainant attached his real estate to secure an indebtedness upon a promissory note. Williams, Ch. J., says: "The case in principle seems much like that of a mortgage. In both cases

for a court of equity to interfere for the prevention of the waste. And in such case the fact that, pending the proceedings for the injunction, the military order ceases to have effect, does not impair the jurisdiction of equity by injunction.<sup>44</sup> But where a judgment creditor whose judgment was a lien upon land of his debtor obtained an injunction restraining the debtor from committing waste, and, pending the injunction, purchased the premises at a sheriff's sale under execution upon his judgment, he was denied an accounting in the same suit for the waste committed prior to his obtaining title to the land, title at the time of the commission of waste being regarded as necessary to sustain a right to an accounting in equity.<sup>45</sup>

§ 659. **Changing character of premises by tenant.** A tenant for lives may be enjoined from changing the nature of the premises demised, as by converting agricultural land into a cemetery, since this would entirely change the

the land is appropriated as security for the debt. In both cases the creditor has the right to take the land, or resort to other property if it can be found. In both cases the debtor may remove the lien by payment of the debt. In both cases the debtor may deny or disprove the existence of the debt. Why, then, should not a court of chancery have the same power to prevent waste upon this property in the one case as well as the other? If it is done in the one case, that the security given by the party should not be destroyed, it should be done in the other, that the security given by the law should not be destroyed. Surely the law must be as anxious to guard its own enactments as the provisions of the parties themselves." Refer-

ring to the objection that complainant was not entitled to the injunction since he was not in possession of the property, the court further say: "Here, from the nature of the case, no actual possession of the property could be obtained by the creditor. But the writ of attachment gave to the creditor the statute privilege, and all the possession that the nature of the case admitted. The property is left in the possession of the debtor just as in the case of a mortgage; but it is, in view of the law, in the custody of the law itself; and being so, the law must protect those who are reposing upon its care."

<sup>44</sup> Webb v. Boyle, 63 N. C., 271.

<sup>45</sup> Hughlett v. Harris, 1 Del. Ch., 349.



character of the property.<sup>46</sup> But changing the demised premises, which have long been rented and used for stores, into dwellings will not warrant an injunction by the owner of the reversion against an assignee of the lessee, when the lease is for a period of nine hundred and ninety-nine years, such a lease being regarded as a perpetuity, and the improvements or changes having the effect of largely increasing the existing security for the rents. And the party aggrieved in such case will be left to pursue his remedy at law.<sup>47</sup>

§ 660. **Improper tillage; removal of manure; beneficial acts by defendant.** The tillage of farming lands contrary to the established rotation of crops, and contrary to the established usage of that part of the country, is such waste as may be enjoined in equity, the tillage being contrary to good husbandry and depreciating the value of the premises.<sup>48</sup> And the lessor of real estate may enjoin his lessee from removing manure from the demised premises which has been made thereon during the tenancy, since the tenant has the right only to use the manure upon the farm, and no right to remove it as his own property.<sup>49</sup> Nor will equity refrain from the exercise of its jurisdiction in restraint or waste merely because defendant has done acts beneficial to the property, or because of his assertion that he will improve it after committing the waste.<sup>50</sup>

§ 661. **Retaining injunction pending writ of error at law.** When a temporary injunction is allowed against the commission of waste, the court directing an action at law to be brought, and defendant obtains judgment in the

<sup>46</sup> *Hunt v. Browne*, Sau. & Sc., House of Lords, 1 L. R. Ir. Ch. D., 178; *Cregan v. Cullen*, 16 Ir. Ch., 249, 3 App. Cas. 709.  
339.

<sup>48</sup> *Wilds v. Layton*, 1 Del. Ch.,

<sup>47</sup> *Doherty v. Allman*, I. R. 10 226.

Eq., 460, reversing S. C., Ib., 362,

<sup>49</sup> *Bonnel v. Allen*, 53 Ind., 130.

and affirmed on appeal to the

<sup>50</sup> *Copplinger v. Gubbins*, 9 Ir. Eq., 304.

action at law, it is discretionary with the court of equity to dissolve or retain the injunction during the pendency of a writ of error to the judgment at law. The court may, therefore, in such a case, on balancing the relative danger and inconvenience to the parties retain the injunction until the writ of error is determined, when such course seems to be necessary for the prevention of irreparable injury.<sup>51</sup>

§ 662. **Injunction pending action at law.** Although the jurisdiction in restraint of waste was originally confined to cases where the relief was sought *pendente lite*, it has long since been extended to cases where no action at law is pending.<sup>52</sup> The jurisdiction is, however, still exercised in some instances as ancillary to or in aid of an action at law concerning real property, and in Wisconsin, under the legislation and code procedure there prevailing, it is held to be proper in an action for the recovery of real property to pray for a temporary or provisional order restraining defendant from committing waste *pendente lite*.<sup>53</sup> And where a preliminary injunction restraining waste is sought in aid of a pending action at law, the plaintiff is not required to make out such a case as will certainly entitle him to a perpetual injunction upon final hearing.<sup>54</sup>

§ 663. **Purchaser under decree enjoined; removal of mineral deposits by tenant.** A purchaser of real estate under a decree, who has not paid the purchase money, may be enjoined from committing waste, although not a party to the

<sup>51</sup> Mountcashell v. O'Neill, 3 Ir. Ch., 619, reversing S. C., *Id.*, 455.

<sup>52</sup> Denny v. Brunson, 29 Pa. St., 382. And in this case it is held that where the authority of the court to issue injunctions is derived from a statute extending its jurisdiction to the prevention or restraining of "acts contrary to

law and prejudicial to the interests of the community, or the rights of individuals," the court may enjoin the commission of waste.

<sup>53</sup> Riemer v. Johnke, 37 Wis., 258.

<sup>54</sup> Buskirk v. King, 18 C. C. A., 418, 72 Fed., 22.

proceedings in which the decree was rendered.<sup>55</sup> And a tenant of a farm on which is a pool fed by a mountain stream depositing in the pool mineral substances of value, may be restrained from removing or disturbing such deposits, complainant's right to the mineral substances having been established by a verdict at law in an action against the same defendant.<sup>56</sup>

§ 664. **Removal of coal.** The tenant for life of premises containing coal mines which he has leased to defendant will not be allowed to join with the remainder-man in a bill to restrain defendant from taking coal from the mines, although it is alleged in the bill that the lease was made through mistake and worked a forfeiture of the life estate, the relief being withheld on the principle that equity will not permit a lessor to disaffirm his own lease.<sup>57</sup>

§ 665. **Insolvency of surety of administrator.** In accordance with the well settled doctrine denying relief by injunction in all cases where adequate relief may be had at law, it is held that an injunction will not lie against a temporary administrator to prevent the commission of waste, upon the ground of the insolvency of his surety, when the law affords ample remedy by compelling the giving of sufficient security.<sup>58</sup>

§ 666. **When quarrying enjoined; mining enjoined pending ejectment.** Where quarrying is the only use that can be made of the premises, it will not be deemed waste if done in a proper manner. And under such circumstances the injunction will not be continued when the answer denies that the quarrying impairs the value of the premises.<sup>59</sup> But where defendant's interest in a quarry and his right to work it

<sup>55</sup> *Casamajor v. Strode*, 1 Sim. & Stu., 381.

<sup>57</sup> *Wentworth v. Turner*, 3 Ves., 4.

<sup>56</sup> *Thomas v. Jones*, 1 Y. & C. C. Ga., 515.

<sup>58</sup> *Montgomery v. Walker*, 36

C., 510.

<sup>59</sup> *Vervalen v. Older*, 4 Halst. Ch., 98.

have expired with the expiration of his lease, he will be restrained from further quarrying.<sup>60</sup> And the taking of stone by a city corporation from complainant's hill, abutting on the right of way which he had granted to the city for streets, is such waste as equity will restrain.<sup>61</sup> And an injunction has been granted, upon the application of a receiver over an estate, to restrain one tenant from committing waste by quarrying in a private road pertaining to the premises and common to all the tenants.<sup>62</sup> So, pending an action of ejectment, defendants have been enjoined from excavating and removing soil in mining upon the premises, the title being in dispute, plaintiff claiming title thereto as agricultural land and defendant claiming title as mineral land.<sup>63</sup>

§ 667. **Diligence required, especially in cases of mines.** The general doctrine of equity requiring diligence upon the part of one who seeks the extraordinary aid of an injunction for the protection of his rights applies with equal force in cases where the preventive aid of the court is sought against the commission of waste.<sup>64</sup> But while diligence in the assertion of his rights is indispensable on the part of one who seeks the aid of equity for the prevention of waste, the utmost degree of promptitude is exacted in cases of waste in mines, owing to the peculiar nature of the property.<sup>65</sup> And where complainant, who seeks relief against the commission of waste in the use of mines on premises demised by him, has stood by for many years

<sup>60</sup> *Ackerman v. Hartley*, 4 Halst. Ch., 476.

<sup>61</sup> *Smith v. City of Rome*, 19 Ga., 89. But in this case the court would seem to have gone beyond the authority of the adjudicated cases in saying that "an injunction to stay waste has become almost a matter of course."

<sup>62</sup> *Dorman v. Dorman*, 3 Ir. Eq., 385.

<sup>63</sup> *Hunt v. Steese*, 75 Cal., 620, 17 Pac., 920.

<sup>64</sup> *Barry v. Barry*, 1 Jac. & W., 651.

<sup>65</sup> *Norway v. Rowe*, 19 Ves., 159; *Parrott v. Palmer*, 3 Myl. & K., 632.

and allowed defendants to expend large sums of money in developing the mines without objection, he will not be allowed an injunction.<sup>66</sup>

§ 668. **Injunction before answer.** Equity will sometimes interfere by injunction against the commission of waste before answer. And even under the former practice of the English Court of Chancery, when an injunction was not usually granted before answer, the court would in cases of waste, upon reasonable evidence of damage or intended waste, grant an injunction before answer to restrain the commission of waste by a servant or agent, himself having no right in the premises.<sup>67</sup>

§ 669. **Accounting an incident to the injunction.** It is a well established principle of equity jurisprudence that in all cases where a bill for an injunction will lie to restrain waste, an account of and satisfaction for the waste already committed will be allowed, to prevent a multiplicity of suits as well as to afford complete redress, without compelling a resort to law.<sup>68</sup> Where, therefore, a proper

<sup>66</sup> Parrott v. Palmer, 3 Myl. & K., 632. "If there be anything well established in this court," says Lord Brougham in this case, "it is that a man who lies by, while he sees another person expend his capital and bestow his labor upon any work, without giving to that person notice, or attempting to interrupt him—one who thus acquiesces in proceedings inconsistent with his own claims—when he comes to enforce those claims in this court, shall in vain seek for its interposition by an injunction, of which the effect would be to render all the expense useless, which he voluntarily suffered to be incurred. Here more years

have been allowed to elapse than the number of weeks which would have closed the doors against the plaintiff coming to seek an injunction."

<sup>67</sup> Lord Orrery v. Newton, Ca. temp. H., 252. But Lord Hardwicke denied an injunction to stay waste in digging coal, before answer filed, because it appeared that defendant set up a right of inheritance in the estate and said that such injunctions were never granted before hearing, unless defendant had only a term in the estate and the reversion was in plaintiff.

<sup>68</sup> Jesus College v. Bloom, 3 Atk., 262; S. C., Amb., 54; Ackerman v. Hartley, 4 Halst. Ch., 476.



case is presented for an injunction, an account of the waste already committed and a decree for damages may be had in the injunction suit.<sup>69</sup> Indeed, this would seem to be but the exercise of the ordinary prerogative of equity, that when one resorts to a court of equity for one purpose, his case will be retained until the entire matter is disposed of, upon the principle that the court having jurisdiction of the cause for one purpose will retain it to give general and complete relief, thereby preventing a multiplicity of suits.<sup>70</sup> And an account for waste committed is considered as a necessary incident of the relief against future waste.<sup>71</sup> And an injunction being refused, as a general rule no account will be allowed for waste already committed.<sup>72</sup>

§ 670. **Accounting may be had without injunction.** If, however, the waste is of such a nature that the party aggrieved is remediless at law, and would sustain great injury by withholding an account, it will be granted, even though an injunction will not be allowed.<sup>73</sup> And in the case of equitable waste committed by one deceased, an account will be allowed against his assets where an injunction would not be appropriate.<sup>74</sup> In cases of mines and collieries the account may be allowed regardless of whether an injunction will lie.<sup>75</sup> And a tenant in common of a mine is

<sup>69</sup> Allison's Appeal, 77 Pa. St., 221; Fleming v. Collins' Adm'r, 2 Del. Ch., 230.

<sup>70</sup> Jesus College v. Bloom, 3 Atk., 262; Allison's Appeal, 77 Pa. St., 221; Fleming v. Collins' Adm'r, 2 Del. Ch., 230.

<sup>71</sup> Ackerman v. Hartley, 4 Halst. Ch., 476.

<sup>72</sup> Crockett v. Crockett, 2 Ohio St., 180, affirming the maxim, "no injunction, no account," announced by Lord Brougham in Parrott v. Palmer, 3 Myl. & K., 632.

<sup>73</sup> Garth v. Cotton, 2 Atk., 751;

Parrott v. Palmer, 3 Myl. & K., 632.

<sup>74</sup> Lansdowne v. Lansdowne, 1 Madd., 116; Morris v. Morris, 3 DeG. & J., 323.

<sup>75</sup> Winchester v. Knight, 1 P. Wms., 406; Story v. Windsor, 2 Atk., 630; Pulteney v. Warren, 6 Ves., 89. And in Parrott v. Palmer, 3 Myl. & K., 632, Lord Brougham, after reviewing the English cases, observes: "From the whole it may be collected that although, as to timber, there exists considerable discrepancy, yet the sound rule is to make the ac-

entitled to an account of the profits.<sup>76</sup> So, too, where there are joint owners of land, one who derives profit from waste committed thereon will be required to account to the other owner.<sup>77</sup> But the same laches which will debar complainant from relief by injunction may prevent his obtaining an account, even in cases of mines.<sup>78</sup>

§ 670 *a*. **Injunction against railway until compensation.** Where an elevated railroad company is in possession of a building as tenant of the owner and is proceeding to tear away a corner of the building for the purpose of constructing its elevated railroad, such an act amounts to waste which will be enjoined until condemnation proceedings are brought and compensation made the owner for the appropriation of his property.<sup>79</sup>

count the incident and not the principle, where there is a remedy at law; but that mines are to be otherwise considered, and that, as to them, the party may have an account even in cases where no injunction would lie."

<sup>76</sup> *Bently v. Bates*, 4 Y. & C., 182.

<sup>77</sup> *Martyn v. Knowllys*, 8 T. R., 145.

<sup>78</sup> *Parrott v. Palmer*, 3 Myl. & K., 632.

<sup>79</sup> *Bass v. Metropolitan W. S. El. Co.*, 27 C. C. A., 147, 82 Fed., 857. 39 L. R. A., 711.

## II. DESTRUCTION OF TIMBER.

- § 671. When equity may enjoin the cutting and removal of timber; accounting.
672. Preliminary steps sufficient ground for interference.
673. Irreparable injury must be shown; injunction not granted as to timber already cut.
674. Injunction not allowed for past injuries, nor where defendants claim both title and possession.
675. Illustrations of the relief.
676. Tendency to a more liberal use of the writ; but not allowed in case of disputed title.
677. Further illustrations.
678. Lessee of shooting privileges.
679. Cutting of timber pending ejectment.

§ 671. **When equity may enjoin the cutting and removal of timber; accounting.** The most frequent class of cases in which the aid of equity is invoked for restraining waste is in the cutting and removal of timber from estates of freehold. Pending an action at law to try disputed titles, the cutting and removal of timber will be enjoined when such timber constitutes the chief value of the land, and when it is shown that defendant would be unable to respond in damages.<sup>1</sup> And the relief is properly granted although no showing of the insolvency of the defendant is made.<sup>2</sup> So where complainant avers title in himself and has brought an action of forcible entry, defendant being in possession of the premises, an injunction may be allowed to prevent defendant from cutting timber.<sup>3</sup> And where both parties claim title, the cutting of timber has been restrained on the principle of bills *quia timet*.<sup>4</sup> Nor is it necessary that there should be an actual *lis pendens* in a court of law, and equity may, in its discretion, enjoin the cutting down and removal of large quantities of timber, where no action is pending.<sup>5</sup>

<sup>1</sup> Kinsler v. Clarke, 2 Hill Ch., 617.

<sup>3</sup> Hicks v. Michael, 15 Cal., 107.

<sup>4</sup> Peak v. Hayden, 3 Bush, 125.

<sup>2</sup> Buskirk v. King, 18 C. C. A., 418, 72 Fed., 22.

<sup>5</sup> Kane v. Vanderburg, 1 Johns. Ch., 11. Kent, Chancellor, in de-

So the cutting and removal of valuable timber by the owner of a life estate in possession, with threats of continuing such acts in the future, to the irreparable injury of the estate, constitute sufficient ground for an injunction for the protection of the owner of the fee.<sup>6</sup> And plaintiffs who have been in possession of land under claim of legal title for many years may enjoin defendants, who are insolvent, from cutting timber which constitutes the chief value of the premises, even though defendants claim title.<sup>7</sup> So the cutting of valuable timber which constitutes the chief value of plaintiff's premises presents a case of such irreparable injury as to warrant relief by injunction.<sup>8</sup> And equity regarding the cutting of timber as an injury of an irreparable nature, and having taken jurisdiction for the purpose of restraining such waste, will do complete justice by decreeing an account and satisfaction for the waste already committed, when plaintiff has the absolute title to the premises.<sup>9</sup>

§ 672. **Preliminary steps sufficient ground for interference.** Although defendant denies any intention of cutting

livering the opinion, says: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court. The tenant for life is here suffering injury to his own interest, and he, by his tenants, is doing great injury to the inheritance, which it is his duty to prevent. He is bound to stop the mischief, or be responsible himself. To suppose that an ejectment must be actually commenced before the injunction can issue is certainly an error. This would be placing the operation of waste beyond the reach of control during the period

of the six months' notice." In this case the bill stated that notices to quit had already been served on defendants and that ejectment would be brought. The court held the notice equivalent to the commencement of an adverse proceeding to try the title at law and sufficient to bring the case within the spirit of the ruling in *Lathrop v. Marsh*, 5 Ves., 259.

<sup>6</sup> *Robertson v. Meadors*, 73 Ind., 43; *Disher v. Disher*, 45 Neb., 100, 63 N. W., 368.

<sup>7</sup> *Piper v. Piper*, 38 N. J. Eq., 81.

<sup>8</sup> *Butman v. James*, 34 Minn., 547, 27 N. W., 66.

<sup>9</sup> *Fleming v. Collins*, Adm'r, 2 Del. Ch., 230.

timber upon the premises concerning which an injunction is sought, yet if he admits having taken preliminary steps for that purpose, such as sending a surveyor to mark the trees preparatory to cutting them, an injunction will be allowed, since it is not necessary that waste should have been actually committed to warrant a court of equity in interfering.<sup>10</sup> Nor is the owner estopped from relief because he has acquiesced in the occasional cutting of timber by defendant prior to seeking an injunction.<sup>11</sup>

§ 673. **Irreparable injury must be shown; injunction not granted as to timber already cut.** Where an injunction is sought against the cutting of timber, it must appear that the trees have a peculiar value, or are of great importance to the estate, as fruit or ornamental trees, and in the case of timber it must appear that its destruction would result in irreparable loss to the estate.<sup>12</sup> The proper thinning out of trees so as to enhance the value of the remaining timber does not constitute waste.<sup>13</sup> So the cutting by a tenant of young trees or saplings, which have not attained such a growth as to be ranked as timber, does not constitute such waste as to warrant an injunction when the trees are not planted for ornament or shelter.<sup>14</sup> And an injunction will not be allowed against the removal of timber already cut on the premises, since it has ceased to be a part of the realty, but is personal property, for which trover will lie.<sup>15</sup> Nor will defendant who is in possession of land under a contract of purchase be restrained from cutting timber, unless it should be continued to such an extent as to render the land insufficient security for the payment of the purchase money.<sup>16</sup> So

<sup>10</sup> *Jackson v. Cator*, 5 Ves., 688.

<sup>14</sup> *Dunn v. Bryan*, 1. R. 7 Eq.,

<sup>11</sup> *Davis v. Hull*, 67 Iowa, 479, 25

143.

N. W., 740.

<sup>15</sup> *Van Wyck v. Alliger*, 6 Barb.,

<sup>12</sup> *Green v. Keen*, 4 Md., 98.

507; *Watson v. Hunter*, 5 Johns.

<sup>13</sup> *Cowley v. Wellesley*, 1 L. R. Ch., 169.

Eq., 656.

<sup>16</sup> *Van Wyck v. Alliger*, 6 Barb.,  
507; *Core v. Bell*, 20 West Va., 169.



the cutting and removal of trees will not be enjoined when it is not shown that defendants are insolvent, or that the injury will be irreparable, and when it does not appear that plaintiff can not obtain full redress in an action for damages.<sup>17</sup> But the cutting of timber upon plaintiff's premises which is necessary for farming purposes and the destruction of shade trees constitute such waste as to warrant relief by injunction.<sup>18</sup>

§ 674. **Injunction not allowed for past injuries, nor where defendants claim both title and possession.** The province of an injunction being preventive rather than remedial, it will not be used to restrain past injuries, and where it does not appear that future waste is threatened the relief will be withheld.<sup>19</sup> And where defendants claim both title and posses-

<sup>17</sup> *Dunkart v. Rinehart*, 87 N. C., 224.

<sup>18</sup> *Powell v. Cheshire*, 70 Ga., 357.

<sup>19</sup> *Southard v. Morris C. & B. Co.*, Saxt., 518; *Watson v. Hunter*, 5 Johns. Ch., 169. *Watson v. Hunter* was a bill filed by the owner of the fee against a tenant for years to restrain the cutting of pine timber on the premises leased, and to restrain the removal of that already cut. Kent, Chancellor, after reviewing the English authorities, says: "This court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief,

which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the courts of common law. \* \* \* Where the mischief would be irreparable it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do not mean to be understood to say that the court will never interfere, but that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of process." See also *Smith v. Cooke*, 3 Atk., 381; *Lee v. Alston*, 1 Ves. Jr., 78; *Garth v. Cotton*, 1 Ves., 528; *Bishop of London v. Web*, 1 P. Wms., 526; *Packington v. Packington*, 3 Atk., 215.

sion, equity will not restrain the cutting of timber, even though it constitutes the chief value of the premises.<sup>20</sup> More especially is this the case where defendants' title has been recognized by complainants.<sup>21</sup> And where the answer fully denies that the cutting of the timber would be an act of irreparable injury, and denies the inability of defendants to respond in pecuniary damages, the injunction will be dissolved.<sup>22</sup>

§ 675. **Illustrations of the relief.** Equity will not stay waste at the suit of one who has failed to recover damages at law after several suits against the parties for trespass in cutting timber on his land.<sup>23</sup> And it would seem that the cutting of such timber as is necessary for repairs and the cultivation of the land will not be enjoined.<sup>24</sup> But a tenant for ninety-nine years, with the privilege of renewal forever, and with leave to purchase the reversion at a stipulated price, will be restrained from cutting young timber which constitutes the chief value of the land.<sup>25</sup> And a tenant under a lease for lives, with a covenant for renewal forever, may nevertheless be enjoined from committing waste upon the demised premises by cutting trees.<sup>26</sup> On proof, however, of complainant's want of title, the injunction will be dissolved, notwithstanding the pendency of his action at law for the trespass in cutting timber.<sup>27</sup>

<sup>20</sup> *Shreve v. Black*, 3 Green Ch., 177.

<sup>21</sup> *Shreve v. Black*, 3 Green Ch., 177. Pennington, Chancellor, says: "My embarrassment is not so much about the title as about the possession. When this is claimed by the defendant, as well as the title, and that, too, in connection with the title, what right has the court to interfere? To enjoin both parties until a trial is had must result in tying up all unimproved lands, about which there

is any dispute, from being enjoyed by their owners."

<sup>22</sup> *Kerlin v. West*, 3 Green Ch., 449.

<sup>23</sup> *West v. Page*, 1 Stockt., 119.

<sup>24</sup> *Duvall v. Waters*, 1 Bland, 569.

<sup>25</sup> *Thruston v. Mustin*, 3 Cranch C. C., 335.

<sup>26</sup> *Hunt v. Browne*, Sau. & Sc. 178; *Coppinger v. Gubbins*, 9 Ir. Eq., 304, criticising *Calvert v. Gason*, 2 Sch. & Lef., 561.

<sup>27</sup> *Westcott v. Gifford*, 1 Halst. Ch., 24.

§ 676. **Tendency to a more liberal use of the writ; but not allowed in case of disputed title.** Although the tendency of courts of equity is to a more liberal use of the writ of injunction in restraint of waste than was formerly allowed, still a strong case of destruction or irreparable mischief must be made out to warrant the relief. And the cutting of timber upon pine lands, valuable chiefly for the wood, is not such a case of irreparable mischief as to warrant the injunction, where defendant sets up an adverse claim to a part of the land, and the title and real ownership are in doubt.<sup>28</sup> But the cutting of timber upon pine timber lands to the prejudice of the inheritance constitutes such waste as to warrant relief in equity by injunction.<sup>29</sup> And the cutting of fruit trees growing in a garden or orchard is held to be waste and destructive of the inheritance and to afford sufficient ground for an injunction.<sup>30</sup>

§ 677. **Further illustrations.** A devisee under a will has been restrained from cutting timber pending an appeal from a decree determining his rights as such devisee.<sup>31</sup> So an injunction has been granted in aid of an action of ejectment, in behalf of plaintiffs therein, to restrain defendants from waste consisting in the destruction of timber upon the premises.<sup>32</sup> And a lessee who has covenanted to plant the demised premises with trees, and to replant such parts as have been injured, keeping the trees enclosed with proper fences, and to preserve the trees growing upon the premises from waste and damage, may be enjoined from cutting the trees and from injury and removing the fences, as well as from permitting cattle to pasture within the enclosure.<sup>33</sup> So a

<sup>28</sup> *West v. Walker*, 2 Green Ch., 129; *Silva v. Garcia*, 65 Cal., 591, 279, and notes. And see *Cornelius v. Post*, 1 Stockt., 196.

<sup>29</sup> *Smith & Fleek's Appeal*, 69 Pa. St., 474. See also *Sheridan v. McMullen*, 12 Ore., 150, 6 Pac., 497.

<sup>30</sup> *Littler v. Thompson*, 2 Beav.,

129; *Silva v. Garcia*, 65 Cal., 591, 4 Pac., 628.

<sup>31</sup> *Wright v. Atkyns*, 1 Ves. & B., 313.

<sup>32</sup> *Neale v. Cripps*, 4 Kay & J., 472.

<sup>33</sup> *Bernard v. Meara*, 12 Ir. Ch., 389.

judgment creditor has been allowed to enjoin his debtor from cutting and removing timber from his land for gain, although the land was exempt from sale under execution as a homestead.<sup>34</sup>

§ 678. **Lessee of shooting privileges.** When a land owner has demised for a term of years the exclusive privilege of shooting over his lands, the lessee of such privilege is not entitled to the aid of equity to enjoin the owner of the premises from cutting timber in the usual course of managing the property.<sup>35</sup>

§ 679. **Cutting of timber pending ejectment.** In ejectment for the recovery of lands which are chiefly valuable for their timber, when plaintiff before establishing his right obtains an injunction restraining defendants from the commission of waste, and then immediately proceeds to cut timber upon the premises for the purpose of removing it, such action is regarded as a violation of the spirit of the injunction and as a gross abuse of the process of the court which would justify the dissolution of the injunction should the application be made.<sup>36</sup>

<sup>34</sup> *Jones v. Britton*, 102 N. C., 166,  
9 S. E., 556.

<sup>35</sup> *Gearns v. Baker*, L. R. 10 Ch.,  
355.

<sup>36</sup> *Haight v. Lucia*, 36 Wis., 356.

## III. EQUITABLE WASTE.

§ 680. Definition of equitable waste.

681. Ornamental timber; intention of devisor to govern.

682. Nice distinctions as to ornamental timber; question one of fact.

683. Destruction of young timber constitutes equitable waste.

684. Injunction not granted where legal relief is the main object of the action.

685. Trust and contingent estates.

§ 680. **Definition of equitable waste.** Equitable waste is defined to consist of such acts as are not considered waste at law, being consistent with the legal rights of the party committing them, but which are deemed waste in equity on account of their manifest injury to the inheritance.<sup>1</sup> In other words, it is an unconscientious or unreasonable exercise of a legal right, for which the law provides no remedy, and it may exist independent of any malicious intention.<sup>2</sup> The remedy by injunction, being to prevent a known and certain injury, is applicable to every species of waste.<sup>3</sup> And if the tenant for life commits waste maliciously, he will be enjoined even though he had the power to do the acts complained of.<sup>4</sup> So if the tenant for life, even where the lease contains a clause without impeachment of waste, wantonly and maliciously injures or destroys buildings or trees, he will be restrained, although the remainder-man is absolutely remediless at law.<sup>5</sup> And the fact that the power is being exercised in an unreasonable manner and against conscience is sufficient to warrant the interference.<sup>6</sup> So, too, the assignee of the tenant for

<sup>1</sup> 2 Story's Eq., § 915.

<sup>2</sup> Turner v. Wright, 2 DeG., F. & J., 234, 245.

<sup>3</sup> Hawley v. Clowes, 2 Johns. Ch., 122.

<sup>4</sup> Abraham v. Bubb, 2 Freem. Chy., 53.

<sup>5</sup> Vane v. Barnard, 1 Salk., 161;

S. C., 2 Vern., 738; Clement v. Wheeler, 25 N. H., 360; Packington v. Packington, 3 Atk., 215; Strathmore v. Bowes, 2 Bro. C. C., 88; Pentland v. Somerville, 2 Ir. Ch., 289.

<sup>6</sup> Aston v. Aston, 1 Ves., 264; Marker v. Marker, 9 Hare, 1.



life without impeachment of waste, will be restrained.<sup>7</sup> And a lessee for years, even though under a lease without impeachment of waste, may be enjoined at the suit of the reversioner having the fee from digging soil for the manufacture of brick to the ruin of the inheritance.<sup>8</sup>

**§ 681. Ornamental timber; intention of devisor to govern.**

The cutting of timber planted for ornament of the premises seems to come within the definition of equitable waste above given,<sup>9</sup> and a tenant in tail, after possibility of issue extinct, will be restrained from such acts of waste.<sup>10</sup> So the cutting or felling of trees that are for the ornament or shelter of the messuage may be enjoined upon the ground of equitable waste.<sup>11</sup> The presumed intention of the devisor governs in determining what trees are to be deemed ornamental, and when this is ascertained the court will extend its protection, whether it regards the trees as ornamental or the contrary.<sup>12</sup> Trees which have been planted or left standing for purposes of protection, as well as those meant to exclude objects from view, are regarded as coming within the rule and will be protected.<sup>13</sup> But the interference is confined to trees of an ornamental nature only, and it will not be extended to those which are planted for profit.<sup>14</sup> And the tenant may thin out ornamental trees without being liable as for waste.<sup>15</sup>

**§ 682. Nice distinctions as to ornamental timber; question one of fact.** Nice distinctions have sometimes been drawn as

<sup>7</sup> *Clement v. Wheeler*, 25 N. H., 110, note; *Downshire v. Sandys*, 361. *Ib.*, 107; *Mahon v. Stanhope*, 3

<sup>8</sup> *Bishop of London v. Web*, 1 P. Wms., 527. *Madd.*, 523; *Marker v. Marker*, 9 Hare, 1.

<sup>9</sup> *Downshire v. Sandys*, 6 Ves., 107; *Wombwell v. Bellasyse*, *Ib.*, 110, note; *Burges v. Lamb*, 16 Ves., 185. <sup>13</sup> *Aston v. Aston*, 1 Ves., 265; *Tamworth v. Ferrers*, 6 Ves., 419; *Downshire v. Sandys*, *Ib.*, 107; *Day v. Merry*, 16 Ves., 375.

<sup>10</sup> *Burges v. Lamb*, 16 Ves., 185; *Day v. Merry*, 16 Ves., 375. <sup>14</sup> *Halliwell v. Philipps*, 4 Jur. N. S., 608.

<sup>11</sup> *Lawley v. Lawley*, cited in a note to *Coffin v. Coffin*, Jac., 71. <sup>15</sup> ——— *v. Copley*, 3 Madd., 525, note.

<sup>12</sup> *Wombwell v. Bellasyse*, 6 Ves.,

to what constitutes ornamental timber, the destruction of which will be enjoined. Thus, it has been held that the writ should extend only to timber "standing for ornament and shelter," and not to timber "contributing to ornament."<sup>16</sup> And in interfering for the protection of ornamental timber equity will confine the relief to such timber as has been planted or left standing for ornament, the question in all such cases being purely one of fact, to be determined in accordance with the presumed will and intention of the person by whom the power was created, and not according to the opinions of the court.<sup>17</sup>

§ 683. **Destruction of young timber constitutes equitable waste.** The destruction of young trees unfit for timber is regarded as equitable waste. But the cutting must be shown to be destructive to the estate, and the fact that the tenant for life, without impeachment of waste, is cutting younger trees than a careful and prudent husbandman would do, will not authorize the interference.<sup>18</sup> But the cutting of saplings at unseasonable times is such malicious destruction as equity will enjoin.<sup>19</sup> So, too, the relief has been extended to the cutting of underwood where it is destructive of the estate.<sup>20</sup>

§ 684. **Injunction not granted where legal relief is the main object of the action.** We have already seen that equity will restrain the commission of waste by the tenant where the rights of the party aggrieved are merely equitable rights, and where no action at law could be maintained against the tenant.<sup>21</sup> But where complainant has only an equitable and not a legal interest in the land, and his action is brought to recover the land itself and damages for waste committed, an

<sup>16</sup> *Williams v. McNamara*, 8 Ves., 70.

<sup>19</sup> *Hole v. Thomas*, 7 Ves., 589.

<sup>20</sup> *Hole v. Thomas*, 7 Ves., 589;

<sup>17</sup> *Marker v. Marker*, 9 Hare, 1.

*Brydges v. Stevens*, 6 Madd., 279.

<sup>18</sup> *Aston v. Aston*, 1 Ves., 265; *Peirs v. Peirs*, Ib., 521; *Tamworth v. Ferrers*, 6 Ves., 419; *Hole v. Thomas*, 7 Ves., 589.

<sup>21</sup> See § 680, *ante*; *Perrot v. Perrot*, 3 Atk., 94; *Robinson v. Litton*, Ib., 210; *Farrant v. Lovel*, Ib., 723; *Garth v. Cotton*, 1 Ves., 556.

injunction will not be granted, since the object of his action is to secure legal and not equitable relief.<sup>22</sup>

§ 685. **Trust and contingent estates.** It is said that the jurisdiction will be more readily exercised in the case of a trust estate.<sup>23</sup> So equity will interfere to prevent waste to the injury of a contingent estate, or an executory devise, depending upon a legal estate.<sup>24</sup> And an heir, who takes by resulting trust, is within the principle of equitable waste until the happening of the contingency.<sup>25</sup> But as between tenants in common, an injunction will not be granted on grounds of purely equitable waste, although the malicious destruction of trees may warrant the interference between such tenants.<sup>26</sup>

<sup>22</sup> *Gillett v. Treganza*, 13 Wis., 472. But it would seem that if the proceeding were addressed by the equitable owner to the equity powers of the court, asking its aid to stay waste, or injuries affecting the freehold, it might be granted by virtue of the general powers of a court of equity. *Id.*

<sup>23</sup> *Robinson v. Litton*, 3 Atk., 210; *Stansfield v. Habergham*, 10 Ves., 277.

<sup>24</sup> *Story's Eq.*, § 914; *Stansfield v. Habergham*, 10 Ves., 277.

<sup>25</sup> *Stansfield v. Habergham*, 10 Ves., 277.

<sup>26</sup> *Hole v. Thomas*, 7 Ves., 589.

## IV. PARTIES.

§ 686. General rule as to parties.

687. Rights of reversioner or remainder-man against tenant for life or years; waste by owner of base fee; mere expectancy of inheriting insufficient.

688. Waste by heir at law disputing will.

689. Devisee for life; removal of building by tenant; waste by under-lessee.

690. Further illustrations.

691. Changing of premises; violation of covenants.

692. Joint tenants and tenants in common.

693. Waste by mortgagor in possession.

694. The same.

695. Chattel mortgages.

696. Plaintiff who has parted with interest denied relief.

§ 686. **General rule as to parties.** While there are many cases where parties committing waste may be restrained by injunction, even though punishable at law,<sup>1</sup> yet as a general rule he only who has the remainder or reversion of the inheritance is entitled to the relief, and the jurisdiction will not be exercised in behalf of one whose only evidence of title consists in the unsupported allegations of his bill.<sup>2</sup> But a single, clear instance of waste on the part of a tenant for life is sufficient to sustain and continue an injunction, especially if it be shown to have been intentional and not the result of accident.<sup>3</sup> And a tenant for life will be restrained at the suit of the remainder-man for killing timber preparatory to cultivating the soil, and from cutting wood for sale.<sup>4</sup>

§ 687. **Rights of reversioner or remainder-man against tenant for life or years; waste by owner of base fee; mere expectancy of inheriting insufficient.** The jurisdiction of equity

<sup>1</sup> 2 Story's Eq., § 913.

<sup>2</sup> Loudon *v.* Warfield, 5 J. J. Marsh., 196.

<sup>3</sup> Sarles *v.* Sarles, 3 Sandf. Ch., 601.

<sup>4</sup> Dickinson *v.* Jones, 36 Ga., 97.

Perhaps the earliest instance of enjoining a tenant for life from the commission of waste is that mentioned in Horner *v.* Popham, Colles, 1.

to stay the commission of waste, at the suit of the owner of the reversion against the tenant for life or years, is well established and rests upon the inadequacy of the remedy at law. And under this head of its jurisdiction equity may properly enjoin the removal of machinery and fixtures by defendants who are tenants of certain premises used for mill purposes, upon a bill by the owner of the premises, such acts being deemed sufficient to set the court in motion, even without an averment of defendant's insolvency.<sup>5</sup> And a tenant for life, even without impeachment of waste, may be enjoined by the remainder-man from committing destructive waste, such as pulling down the mansion house, since the clause "without impeachment of waste" is not extended to allow the destruction of the estate itself, but only to excuse from permissive waste.<sup>6</sup> So a contingent remainder-man, whose estate is not yet vested by the happening of the event, may restrain the tenant for life in possession from committing waste to the injury of the estate.<sup>7</sup> The doctrine has been broadly asserted that an executory devisee can not enjoin the commission of waste by the owner of a base or qualified fee.<sup>8</sup> The rule as thus announced has been followed, with the qualification, however, that the relief may be granted in the proper case where it appears that the contingency which will determine the fee is reasonably certain to happen and the waste is of such a character that the defendant must be deemed guilty of an abuse of his rights.<sup>9</sup> But the tenant for life will not be restrained from the removal of personal property unless good ground is shown for apprehending that there is danger of its removal.<sup>10</sup> And the fears and appre-

<sup>5</sup> *Poertner v. Russell*, 33 Wis., 193.

<sup>8</sup> *Matthews v. Hudson*, 81 Ga., 120, 7 S. E., 286, 12 Am. St. Rep., 305.

<sup>6</sup> *Lord Bernard's Case*, Finch's Precedents, 454.

<sup>9</sup> *Gannon v. Peterson*, 193 Ill., 372, 62 N. E., 210, 55 L. R. A., 701.

<sup>7</sup> *Cannon v. Barry*, 59 Miss., 289; *University v. Tucker*, 31 West Va., 621, 8 S. E., 410. And see *Cowand v. Meyers*, 99 N. C., 198, 6 S. E., 82.

<sup>10</sup> *Clagon v. Veasey*, 7 Ired. Eq., 175.



hensions of the remainder-man are not sufficient to authorize the injunction, but the facts must be shown which constitute the danger of the removal.<sup>11</sup> And a mere expectancy to inherit unaccompanied by any estate or interest in the land is not sufficient to authorize an injunction against waste.<sup>12</sup>

§ 688. **Waste by heir at law disputing will.** It is the doctrine of the Irish Court of Chancery that equity has jurisdiction to restrain waste committed by the heir in possession of realty and disputing the will of the ancestor, the relief in such case being based upon the necessity of preventing irreparable injury to the estate.<sup>13</sup> So where an heir at law, disputing the will of his ancestor, has entered into possession of the devised estates, and a court of equity directs an issue to be tried at law as to the validity of the will, *devisavit vel non*, upon a bill by the executors against the heir to establish the will the court may properly grant an injunction against waste by the heir in possession, and may also appoint a receiver over the estate.<sup>14</sup>

§ 689. **Devisee for life; removal of building by tenant; waste by under-lessee.** A devisee for life may be restrained by the owner in fee from the cutting down of timber other than that necessary for the use and cultivation of the premises.<sup>15</sup> But a landlord, who is not entitled to the reversion, will not be allowed to enjoin the commission of waste by the removal from the premises of a building erected by the tenant,<sup>16</sup> though a ground landlord is entitled to an injunction to restrain an under-lessee from the commission of waste.<sup>17</sup>

§ 690. **Further illustrations.** A tenant from year to year may be enjoined from removing crops, straw and manure,

<sup>11</sup> *Lehman v. Logan*, 7 Ired. Eq., 296.

<sup>12</sup> *Gwaltney v. Gwaltney*, 119 Ind., 144, 21 N. E., 552.

<sup>13</sup> *Fingal v. Blake*, 2 Mol., 50.

<sup>14</sup> *Fingal v. Blake*, 1 Mol., 113.

<sup>15</sup> *Smith v. Poyas*, 2 Desaus. Eq., 65.

<sup>16</sup> *Perrine v. Marsden*, 34 Cal., 14.

<sup>17</sup> *Farrant v. Lovel*, 3 Atk., 723.

where it is contrary to the custom of the country.<sup>18</sup> And it has been held that the sowing of land with hurtful crops is such waste as equity will restrain.<sup>19</sup> So a tenant who is abusing his right of estovers, thereby exceeding his right or power under the lease, may be enjoined. And in such case no length of time will justify the tenant in such abuse, since as between himself and his landlord, the only test of the tenant's right is the lease under which he holds.<sup>20</sup> And an assignee of the original lessee, holding for a term of years, may have an injunction against waste committed by his under-lessee.<sup>21</sup> But an injunction will not be granted in behalf of a remainder-man to restrain the tenant for life from opening the soil in new places for the digging of coal, such use of the premises being in accordance with the uniform practice and usage of the country.<sup>22</sup> Nor will an interlocutory injunction be granted to stay the commission of waste by tenants who are in possession of the premises, and who have not been brought before the court, since their interest in the premises being a legal interest, they are entitled to protection, and should be made parties to the proceeding before being enjoined.<sup>23</sup>

§ 691. **Changing of premises; violation of covenants.** The aid of equity may be properly invoked by the owner of the fee to restrain a sub-lessee from effecting such changes in the premises as are inconsistent with the terms of the lease, and as are likely to result in such injury to the owner's right as is not susceptible of adequate compensation at law.<sup>24</sup> And a tenant for years may be enjoined at the suit of his lessor from using the premises in violation of his covenants

<sup>18</sup> *Pulteney v. Shelton*, 5 Ves., 147; *Onslow v. —*, 16 Ves., 173; *Pratt v. Brett*, 2 Madd., 62.

<sup>19</sup> *Pratt v. Brett*, 2 Madd., 62.

<sup>20</sup> *Lord Courtown v. Ward*, 1 Sch. & Lef., 8,

<sup>21</sup> *Farrant v. Lovel*, 3 Atk., 723; S. C., Amb., 105.

<sup>22</sup> *Clavering v. Clavering*, 2 P. Wms., 388.

<sup>23</sup> *Lord Norbury v. Alleyne*, 1 Dr. & Wal., 337.

<sup>24</sup> *Baughier v. Crane*, 27 Md., 36.

contained in the lease.<sup>25</sup> So, too, the lessor may restrain his lessee, or those claiming under him or acting by his authority, from converting the demised premises to uses repugnant to the terms of the lease,<sup>26</sup> and from making material alterations, as by changing a building rented for a post office into a beer hall,<sup>27</sup> or a dwelling into a warehouse.<sup>28</sup>

§ 692. **Joint tenants and tenants in common.** As a general rule equity will not interfere to restrain waste as between joint tenants, tenants in common, or coparceners, since their right is equal in the use and enjoyment of the estate.<sup>29</sup> It is otherwise, however, if the defendant be insolvent and incapable of responding in pecuniary damages.<sup>30</sup> And where the waste is destructive to the estate, and not within the usual and legitimate enjoyment of the premises, such as cutting growing timber not necessary to carry on farming operations, the relief will be granted.<sup>31</sup> So, too, if one of the parties occupies as a tenant to the other, equity may interfere.<sup>32</sup> And the husband of a tenant in common may be enjoined from committing waste, in an action brought for a partition of the premises between the co-tenants.<sup>33</sup> But tenants in common will not be enjoined from cutting timber where insolvency is not averred, and it does not appear that they are exceeding their share of the timber.<sup>34</sup>

§ 693. **Waste by mortgagor in possession.** Again, equity will restrain the commission of waste in behalf of one whose

<sup>25</sup> *Frank v. Brunnemann*, 8 West Va., 462.

<sup>26</sup> *Stewart v. Winters*, 4 Sandf. Ch., 587. See also *Frank v. Brunnemann*, 8 West Va., 462.

<sup>27</sup> *Maddox v. White*, 4 Md., 72.

<sup>28</sup> *Douglass v. Wiggins*, 1 Johns. Ch., 435.

<sup>29</sup> *Goodwin v. Spray*, Dick., 667; *Hole v. Thomas*, 7 Ves., 589; *Mott v. Underwood*, 148 N. Y., 463, 42

N. E., 1048, 32 L. R. A., 270, 51 Am. St. Rep., 711.

<sup>30</sup> *Smallman v. Onions*, 3 Bro. C. C., 621; *Stout v. Curry*, 110 Ind., 514, 11 N. E., 487.

<sup>31</sup> *Hawley v. Clowes*, 2 Johns. Ch., 122; *Stout v. Curry*, 110 Ind., 514, 11 N. E., 487.

<sup>32</sup> *Twart v. Twart*, 16 Ves., 128.

<sup>33</sup> *Weise v. Welsh*, 3 Stew., 431.

<sup>34</sup> *Hihn v. Peck*, 18 Cal., 640.

rights are only equitable, and who would be remediless by the strict rules of law. The most frequent instance of the exercise of the jurisdiction in such cases is in restraining waste by the mortgagor in possession of mortgaged premises.<sup>35</sup> The mortgagor in possession, although he may exercise all acts of ownership, even to the extent of committing waste which does not impair the security,<sup>36</sup> or render it insufficient or of doubtful sufficiency,<sup>37</sup> will nevertheless be restrained from such acts as depreciate the value of the premises and render the security insufficient.<sup>38</sup> Especially is this the case where the mortgagor has been declared a bankrupt, and his property has vested in an assignee.<sup>39</sup> And if necessary the injunction will be allowed before the mortgage is due.<sup>40</sup> And a mortgagee of an undivided interest in lands

<sup>35</sup> For a full discussion of the subject of injunctions in restraint of waste of mortgaged premises, see chapter VII, *ante*, subdivision IV.

<sup>36</sup> *Kekewich v. Marker*, 3 Mac. & G., 329.

<sup>37</sup> *Moriarty v. Ashworth*, 43 Minn., 1, 44 N. W., 531, 19 Am. St. Rep., 203.

<sup>38</sup> *Ensign v. Colburn*, 11 Paige, 503; *Gray v. Baldwin*, 8 Blackf., 164; *Usborne v. Usborne*, Dick., 75; *Humphreys v. Harrison*, 1 Jac. & W., 581; *Robinson v. Preswick*, 3 Edw. Ch., 247; *Bunker v. Locke*, 15 Wis., 635; *Fairbank v. Cudworth*, 33 Wis., 358; *Maryland v. Northern C. R. Co.*, 18 Md., 193; *Brown v. Stewart*, 1 Md. Ch., 87. See also *Coggill v. Millburn Land Co.*, 10 C. E. Green, 87. In *Brown v. Stewart*, 1 Md. Ch., 87, it is said that, "It would certainly be falling short of the demands of justice and the exigency of the case if

this court, when the remedy is sought exclusively here (in equity), has not the power in a proper case to protect the subject of the controversy from destruction while the suit is depending." In *King v. Smith*, 2 Hare, 244, Wigram, Vice Chancellor, thus defines the term "sufficient security:" "I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

<sup>39</sup> *Ensign v. Colburn*, 11 Paige, 503.

<sup>40</sup> *Murdock's Case*, 2 Bland, 461; *Salmon v. Clagett*, 3 Bland, 125.

held by tenants in common may enjoin persons in possession under license from a co-tenant from committing waste by cutting timber which constitutes the chief value of the estate.<sup>41</sup>

§ 694. **The same.** The principle upon which the interference is based as against a mortgagor in possession is twofold: first, the right of the mortgagee to his whole security unimpaired during the life of the mortgage;<sup>42</sup> and, second, that as between mortgagor and mortgagee, the latter is considered in equity as the owner of the fee, and as such entitled to the interference of the court.<sup>43</sup> But the relief will not be withheld even where the mortgagee is not considered the owner of the fee.<sup>44</sup> And where the mortgage is treated merely as a security for the debt, the injunction is allowed to prevent the destruction of the security.<sup>45</sup> So equity will enjoin the commission of waste by the mortgagor in possession even after forfeiture has occurred on his part, and after the right to proceed at law has accrued.<sup>46</sup> But, if adequate damages can be recovered at law for the injury committed, and it is not alleged that defendants are insolvent, relief in equity will be refused.<sup>47</sup>

§ 695. **Chattel mortgages.** The same principles apply to mortgages of chattels, and equity will interfere to restrain waste committed by the mortgagor in possession after default, since the mortgagee is not bound to take possession of the property by process of law, but may elect to seek his remedy in equity.<sup>48</sup> And the jurisdiction may be exercised

<sup>41</sup> *Atkinson v. Hewitt*, 51 Wis., 275, 8 N. W., 211.

<sup>42</sup> *Nelson v. Pinegar*, 30 Ill., 473; *Fairbank v. Cudworth*, 33 Wis., 358; *Humphreys v. Harrison*, 1 Jac. & W., 581; *Robinson v. Preswick*, 3 Edw. Ch., 247.

<sup>43</sup> *Nelson v. Pinegar*, 30 Ill., 473; *Robinson v. Litton*, 3 Atk., 209.

<sup>44</sup> *Brady v. Waldron*, 2 Johns. Ch., 148.

<sup>45</sup> *Cooper v. Davis*, 15 Conn., 561; *Murdock's Case*, 2 Bland, 461; *Salmon v. Clagett*, 3 Bland, 125.

<sup>46</sup> *Maryland v. Northern C. R. Co.*, 18 Md., 193.

<sup>47</sup> *Robinson v. Russell*, 24 Cal., 467.

<sup>48</sup> *Parsons v. Hughes*, 12 Md., 1.



before the mortgagee is entitled to proceed at law for the recovery of his debt.<sup>49</sup>

§ 696. **Plaintiff who has parted with interest denied relief.** Where complainant, after mortgaging his premises, has sold the equity of redemption without taking security as an indemnity against his bond, he has no interest in the land sufficient to warrant an injunction, nor will it be granted on the ground that the property may be insufficient to satisfy the mortgage, and that he will be held liable for the balance.<sup>50</sup> And where complainant has parted with all his interest, and holds the title merely as security for the payment of the money due him, he stands in the situation of a mortgagee out of possession, and will not be allowed to restrain the cutting of timber unless it is shown that the security is being impaired.<sup>51</sup>

<sup>49</sup> *Clagett v. Salmon*, 5 Gill & J., ~ <sup>51</sup> *Scott v. Wharton*, 2 Hen. & M., 25.

<sup>50</sup> *Brumley v. Fanning*, 1 Johns. Ch., 501.

## CHAPTER XII.

### OF INJUNCTIONS AGAINST TRESPASS.

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#### I. GENERAL FEATURES OF THE JURISDICTION.

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- 720. When discretion of inferior court not interfered with.

§ 721. Where interlocutory injunction retained to the hearing.

722. Requisites of bill; damages awarded in same action.

722*a*. Trespass upon public lands enjoined.

722*b*. Adoption of legal remedy as test to relief.

§ 697. **Origin and nature of the jurisdiction.** The granting of injunctions against the commission of trespass seems to have grown out of the jurisdiction in cases of waste, to which the relief was formerly confined. Privity of title being the essential ground of the interference in restraint of waste, it was not until a comparatively recent period that the rule was relaxed to admit of the relief against a naked trespass, unaccompanied with privity of title.<sup>1</sup> The jurisdiction may now, however, be regarded as well established, although it is still sparingly exercised, being confined to cases where from the peculiar nature of the property affected by the trespass or from its frequent repetition the injury sustained can not be remedied by an action for damages, and where it may, therefore, be properly termed irreparable. The foundation of the jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, and where facts are not shown to bring the case within these conditions, the relief will be refused.<sup>2</sup> Equity will not, therefore, enjoin a mere trespass to realty as such, in the

<sup>1</sup> *Moore v. Ferrell*, 1 Ga., 7. The earliest case is known as *Flamang's Case*, cited in 6 Ves., 147, 7 Ves., 308, and 8 Ves., 90, in which Lord Thurlow granted the relief with reluctance against a trespasser who was working into minerals on complainant's close, and thus impairing the substance of the estate. The relief was based solely upon the irreparable injury that would result from a continuation of the trespass. The same

principle was afterward recognized and followed by Lord Eldon. See *Mitchell v. Dors*, 6 Ves., 147.

<sup>2</sup> *Thorn v. Sweeney*, 12 Nev., 251; *Western Union Telegraph Co. v. Judkins*, 70 Ala., 428; *McGregor v. Silver King Mining Co.*, 14 Utah, 47, 45 Pac., 1091, 60 Am. St. Rep., 883; *Myers v. Hawkins*, 67 Ark., 413, 56 S. W., 640; *Collins v. Sutton*, 94 Va., 127, 26 S. E., 415; *Moore v. Halliday*, (Ore.) 72 Pac., 801.

absence of any element of irreparable injury.<sup>3</sup> But where, owing to the peculiar character of the property in question, the trespass complained of can not be adequately compensated in damages, and the remedy at law is plainly inadequate, equity may properly interfere by injunction.<sup>4</sup> So a trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate unless by a multiplicity of suits, affords sufficient ground for relief by injunction.<sup>5</sup> So where the acts of trespass are constantly recurring, although each act, taken by itself, would neither be destructive of the estate nor inflict irreparable injury, and the legal remedy would therefore be entirely adequate to redress each act taken alone, equity will restrain such trespasses, basing the relief in such cases upon the utter inadequacy of the remedy at law.<sup>6</sup> So equity may properly interfere to restrain repeated and continuous trespasses where it would be difficult or impossible to ascertain the damage resulting from each act complained of.<sup>7</sup> So also relief may be granted

<sup>3</sup> *German v. Clark*, 71 N. C., 417; *Smith v. Gardner*, 12 Ore., 221, 6 Pac., 771; *Miller v. Burket*, 132 Ind., 469, 32 N. E., 309; *Waters v. Lewis*, 106 Ga., 758, 32 S. E., 854. But in Iowa it would seem that an injunction may be had to restrain a mere trespass to realty. See *Grant v. Crow*, 47 Iowa, 632.

<sup>4</sup> *Clark v. Jeffersonville R. Co.*, 44 Ind., 248; *Poughkeepsie Gas Co. v. Citizens Gas Co.*, 89 N. Y., 493.

<sup>5</sup> *Ellis v. Wren*, 84 Ky., 254, 1 S. W., 440; *Palmer v. Israel*, 13 Mont., 209, 33 Pac., 134; *Milan Steam Mills v. Hickey*, 59 N. H., 241; *Ellis v. B. M. F. Assn.*, 69 N. H., 385, 41 Atl., 856, 42 L. R. A., 570; *Coatsworth v. Lehigh V. R. Co.*, 156 N. Y., 451, 51 N. E., 301; *Carpenter v. Capital Electric Co.*,

178 Ill., 29, 52 N. E., 973, 43 L. R. A., 645, 69 Am. St. Rep., 286; *Taylor v. Pearce*, 179 Ill., 145, 53 N. E., 622; *Lonsdale Co. v. City of Woonsocket*, 21 R. I., 498, 44 Atl., 929; *United States F. L. & E. Co. v. Gallegos*, 32 C. C. A., 470, 89 Fed., 769; *Pittsburg, S. & W. R. Co. v. Fiske*, 60 C. C. A., 621, 123 Fed., 760; *Strawberry C. Co. v. Chipman*, 13 Utah, 454, 45 Pac., 348; *Hooper v. Dora C. M. Co.*, 95 Ala., 235, 10 So., 652; *Shaffer v. Stull*, 32 Neb., 94, 48 N. W., 882.

<sup>6</sup> *Murphy v. Lincoln*, 63 Vt., 278, 22 Atl., 418; *Griffith v. Hilliard*, 64 Vt., 643, 25 Atl., 427; *Colliton v. Oxborough*, 86 Minn., 361, 90 N. W., 793.

<sup>7</sup> *Boston & M. R. Co. v. Sullivan*, 177 Mass., 230, 58 N. E., 689, 83

where, from the nature of the case, it will be impossible to estimate the actual damage which the plaintiff will suffer.<sup>8</sup> But where the recurrence of the injury complained of is not to be apprehended and the remedy at law is consequently adequate, relief by injunction is properly denied.<sup>9</sup> And the injury resulting from a trespass, in order to be a continuing one justifying relief by injunction, must be of such a character that its recurrence is not dependent upon any act to be done by any person, but results from a continuing state or condition of things caused by the act of trespass itself.<sup>10</sup>

§ 698. **Plaintiff must show good title; exceptions to rule.**

To warrant the relief in this class of cases the party aggrieved must show a satisfactory title to the *locus in quo*, and if the title be denied or in doubt the injunction will generally be refused against a defendant in possession, until the title is established at law.<sup>11</sup> And upon the same principle the relief will be denied against one in possession where the right to the possession is in dispute.<sup>12</sup> But a mere denial of plaintiff's title is not alone sufficient, but such denial must be supported by allegations of fact which show the

Am. St. Rep., 275; New York, N. H. & H. R. Co. v. Scovill, 71 Conn., 136, 41 Atl., 246, 42 L. R. A., 157, 71 Am. St. Rep., 159.

<sup>8</sup> Southern Pac. R. Co. v. City of Oakland, 58 Fed., 50; Indianapolis N. G. Co. v. Kibbey, 135 Ind., 357, 35 N. E., 392.

<sup>9</sup> Garrett v. Bishop, 27 Ore., 349, 41 Pac., 10.

<sup>10</sup> Deegan v. Neville, 127 Ala., 471, 27 So., 173, 85 Am. St. Rep., 137.

<sup>11</sup> Perry v. Parker, 1 Woodb. & M., 280; Chesapeake, O. & C. Co. v. Young, 3 Md., 480; Eskridge v. Eskridge, 51 Miss., 522; Old Telegraph M. Co. v. Central S. Co., 1

Utah, 331; Kellar v. Bullington, 101 Ala., 267, 14 So., 466. See also Walker v. Fox, 85 Tenn., 154, 2 S. W., 98. In New York it would seem that the rule requiring the right, when in doubt, to be established at law as a condition to equitable relief, is one of discretion rather than of jurisdiction and that a court of equity may, in the first instance and notwithstanding defendant's denial of the plaintiff's title to the *locus in quo*, proceed to adjudicate the question of title and grant equitable relief accordingly. Baron v. Korn, 127 N. Y., 224, 27 N. E., 804.

<sup>12</sup> Bowling v. Crook, 104 Ala., 130, 16 So., 131.



existence of a substantial dispute.<sup>13</sup> And the rule has been relaxed in strong cases of irreparable injury, as where the trespass will result in the destruction of the substance or chief value of the estate, and in such cases temporary injunctions are frequently granted until the determination of the disputed question of title in an action at law either pending or about to be commenced.<sup>14</sup> And where the party aggrieved is in possession he will be allowed to restrain such trespasses as would result in irreparable damage in the event of refusing the relief.<sup>15</sup> Equity will not, however, enjoin a

<sup>13</sup> *Miller v. Lynch*, 149 Pa. St., 460, 24 Atl., 80.

<sup>14</sup> *Burnley v. Cook*, 13 Tex., 586; *Hart v. Mayor of Albany*, 9 Wend., 570, affirming S. C., 3 Paige, 213; *Bettman v. Harness*, 42 West Va., 433, 26 S. E., 271, 36 L. R. A., 566; *Freer v. Davis*, 52 West Va., 1, 43 S. E., 164, 59 L. R. A., 556, 94 Am. St. Rep., 895; *Sautee River Cypress Lumber Co. v. James*, 50 Fed., 360; *King v. Campbell*, 85 Fed., 814; *Wadsworth v. Goree*, 96 Ala., 227, 10 So., 848. In Vermont, when the title to the *locus in quo* is in dispute, it is discretionary with the court to issue a temporary injunction, continuing it in force during such time as may be necessary to enable the plaintiff to establish his title at law. *Griffith v. Hilliard*, 64 Vt., 643, 25 Atl., 427. Where a temporary injunction has been granted pending the determination of the question of title in an action at law, the injunction should be dissolved and the bill dismissed upon a judgment in favor of the defendant in the action at law. *King v. Williamson*, 25 C. C. A., 355, 80 Fed., 170; *King v. Buskirk*, 24 C. C. A., 82, 78 Fed.,

233. See *Freer v. Davis*, 52 West Va., 1, 43 S. E., 164, 59 L. R. A., 556, 94 Am. St. Rep., 895, *supra*, upon the question whether, having taken jurisdiction by the issuing of a temporary injunction, the court may adjudicate the question of title under the general rule that, where equity takes jurisdiction for one purpose, it retains it for all purposes.

<sup>15</sup> *Lowndes v. Bettle*, 33 L. J. Ch., 451; *Stanford v. Hurlstone*, L. R. 9 Ch. App., 116. In *Lowndes v. Bettle*, complainant and his ancestors had been in possession during a period of eighty years, and defendant, who claimed as heir at law, sought to enter and exercise acts of ownership by cutting sods and timber. The injunction was granted upon the principle stated in the text. The distinctions resting upon the question of possession are very clearly set forth by *Kindersley*, Vice Chancellor, as follows: "Where, therefore, the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant

trespass to realty when plaintiff's title is in dispute and has not been established at law, when no irreparable injury is shown.<sup>16</sup> And when defendants are in possession alike with plaintiffs of the premises in controversy, and the title is doubtful and disputed, and it is not shown that plaintiffs have taken any steps to establish their title and no reason is shown why they are not so doing, they will be denied an injunction. "In such case a court of equity will not presume to determine the title to the property upon affidavits, and will not permit a temporary injunction to be granted which would operate as an action of ejectment."<sup>17</sup> And where the authorities of a city are threatening to remove and destroy a floating store-house constructed by complainants and moored by them in a public basin or harbor, but complainants fail to show any right or title to establish or continue their erection in the place in question, equity will refuse to enjoin the threatened action because of such failure to establish any legal right.<sup>18</sup> So when the trespass complained of consists in an entry by defendants upon the premises in question and the erection of buildings thereon, there being a dispute as to the title, and the injury being a naked trespass which will not produce irreparable mischief or tend to the destruction of the inheritance, equity will not enjoin.<sup>19</sup>

an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, there the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate." And see *Hart v. Mayor of Albany*, 3

*Paige*, 213; *Tribune Association v. The Sun*, 7 Hun, 175.

<sup>16</sup> *Maloon v. White*, 57 N. H., 152; *Cresap v. Kemble*, 26 West Va., 603; *Watson v. Farrell*, 34 West Va., 406, 12 S. E., 724; *Sharpe v. Loane*, 124 N. C., 1, 32 S. E., 318.

<sup>17</sup> *Old Telegraph M. Co. v. Central S. Co.*, 1 Utah, 331.

<sup>18</sup> *Hart v. Mayor of Albany*, 9 Wend., 572, affirming S. C., 3 *Paige*, 213.

<sup>19</sup> *LeRoy v. Wright*, 4 Sawy., 530.

And where the title to the premises is in dispute, both parties claiming title thereto, it is held that an interlocutory injunction should be dissolved upon answer disclosing defendants' claim of title and showing that they are acting in good faith, believing themselves to be the owners of the premises, and that they are not insolvent.<sup>20</sup> But it is held that the denial of plaintiff's title by the answer will not, of itself, suffice to dissolve the injunction.<sup>21</sup> And where the trespass consists in the erection of a building partly upon lands claimed by plaintiff and in using the whole of plaintiff's house as a party-wall, the question of title being in dispute between the parties, a temporary injunction is proper to preserve the *status quo* until the title can be determined in an action at law.<sup>22</sup> And the relief may be allowed, in a proper case, upon the application of the holder of the equitable title.<sup>23</sup> But equity will not enjoin interference with a mere chattel interest in lands, when it is not shown that the injury is irreparable, or that defendant is insolvent.<sup>24</sup> And a trespasser upon real property will not be allowed an injunction to protect his possession by restraining the former occupants from maintaining their possession.<sup>25</sup>

§ 699. **Remedy at law a bar to injunction; the doctrine illustrated.** A fundamental doctrine underlying the entire jurisdiction of equity by injunction against the commission of trespass is, that where adequate relief may be had in the usual course of procedure at law, equity will not interpose by the extraordinary remedy of injunction.<sup>26</sup> For example,

<sup>20</sup> Bell *v.* Chadwick, 71 N. C., 329.

<sup>21</sup> Moore *v.* Ferrell, 1 Ga., 7.

<sup>22</sup> Clayton *v.* Shoemaker, 67 Md., 216, 9 Atl., 635.

<sup>23</sup> Wilson *v.* Rockwell, 29 Fed., 674.

<sup>24</sup> Ellsworth *v.* Hale, 33 Ark., 633.

<sup>25</sup> Littlejohn *v.* Attrill, 94 N. Y.,

619. And see Davis *v.* Stark, 30 Kan., 565, 2 Pac., 637.

<sup>26</sup> Cooper *v.* Hamilton, 8 Blackf., 377; Smith *v.* Smith, 4 Jones Eq., 303; Gause *v.* Perkins, 3 Jones Eq., 177; Stevens *v.* Beekman, 1 Johns. Ch., 318; Murray *v.* Knapp, 62 Barb., 566; Thorn *v.* Sweeney, 12 Nev., 251; Spofford *v.* Bangor &

where plaintiff is out of possession, although claiming the title in fee, he will not be allowed to enjoin defendants from entering upon the premises or committing acts of trespass thereon, the remedy at law being ample in such case.<sup>27</sup> And where a sheriff has attempted to sell plaintiff's real estate under a judgment against the former owner, which it is alleged is not a lien upon the premises in plaintiff's hands, the sheriff will not be enjoined from attempting to dispossess him, since the appropriate remedy would be an action of trespass against the sheriff.<sup>28</sup> So when upon a bill to enjoin interference with real property claimed by plaintiff it is alleged that defendant has intermeddled with the property and forbidden the lessees to pay rent, and that he has forcibly entered one of the buildings upon the premises, no sufficient ground is shown for the injunction, since the grievances complained of may all be remedied at law.<sup>29</sup> And the

B. R. Co., 66 Me., 51; *Seymour v.* 41 N. E., 154; *Harms v. Jacobs*, 158 Ill., 505, 41 N. E., 1071; *Lana-han v. Gahan*, 37 Md., 105; *Nicodemus v. Nicodemus*, 41 Md., 529; *Whalen v. Dalashmutt*, 59 Md., 250; *Boyden v. Bragaw*, 53 N. J. Eq., 26, 30 Atl., 330; *Fisher v. Carpenter*, 67 N. H., 569, 39 Atl., 1018; *Mobile & G. R. Co. v. A. M. R. Co.*, 87 Ala., 520, 6 So., 407; *Kellar v. Bullington*, 101 Ala., 267, 14 So., 466; *Collins v. Sutton*, 94 Va., 127, 26 S. E., 415; *Heaney v. Butte & M. C. Co.*, 10 Mont., 590, 27 Pac., 379; *Perry v. Hamilton*, 138 Ind., 271, 35 N. E., 836; *Beatty v. Smith*, 14 S. Dak., 24, 84 N. W., 208.

<sup>27</sup> *Spofford v. Bangor & B. R. Co.*, 66 Me., 51.

<sup>28</sup> *Seymour v. Morgan*, 45 Ga., 201.

<sup>29</sup> *Burns v. Burns*, 13 Fla., 369.

*B. R. Co.*, 66 Me., 51; *Seymour v. Morgan*, 45 Ga., 201; *Burns v. Burns*, 13 Fla., 369; *Odlin v. Woodruff*, 31 Fla., 160, 12 So., 227, 22 L. R. A., 699; *Carney v. Hadley*, 32 Fla., 344, 14 So., 4, 22 L. R. A., 233, 37 Am. St. Rep., 101; *Minnig's Appeal*, 82 Pa. St., 373; *Jordan v. Lanier*, 73 N. C., 90; *Frink v. Stewart*, 94 N. C., 484; *Morganton L. & I. Co. v. Webb*, 117 N. C., 478, 23 S. E., 458; *Sharpe v. Loane*, 124 N. C., 1, 32 S. E., 318; *Smith v. Gardner*, 12 Ore., 221, 6 Pac., 771; *Tomasini v. Taylor*, 42 Ore., 576, 72 Pac., 324; *Smith v. City of Oconomowoc*, 49 Wis., 694, 6 N. W., 329; *Mechanics Foundry v. Ryall*, 62 Cal., 416; *Meeker v. Gilbert*, 3 Wash., 369; *Goodell v. Lassen*, 69 Ill., 145; *Chicago Public Stock Exchange v. McClaughry*, 148 Ill., 372, 36 N. E., 88; *Commissioners of Highway v. Green*, 156 Ill., 504,

mere entry upon and use of plaintiff's land by defendant for the purpose of constructing a stone culvert over a mill-race belonging to defendant is not such a trespass as to warrant relief by injunction, the injury not being irreparable in its character, or such as can not be compensated in an action at law.<sup>30</sup> So defendant will not be restrained from using a division wall between his premises and those of plaintiff, when the rights involved are purely legal rights, and the injury sustained, if any, is susceptible of adequate redress at law. Especially will the relief be refused, in such case, when plaintiff has parted with his title to the lands in question after the filing of the bill.<sup>31</sup> And where the trespass, which it is sought to enjoin is but of a fugitive or temporary nature such as the removal of a fence separating defendant's premises from those of plaintiff, which may be readily compensated in damages, a court of equity will decline to interfere by injunction.<sup>32</sup> So when a tenant is engaged in the business of pawnbroking, he will not be enjoined, at the suit of his landlord, from attaching to the premises the usual pawnbroker's sign of three balls, as indicating his business, since if any injury would result to the landlord from such offensive sign his remedy at law would be ample.<sup>33</sup>

§ 700. **Exceptions; coverture; multiplicity of suits.** To the general doctrine as above stated, denying relief by injunction against a trespass for which adequate remedy exists at law, an exception is recognized where the equitable owner of the property injured is under some disability which would prevent the enforcement of the legal remedy, as where property is bequeathed to a *feme covert* as her separate estate, without the intervention of a trustee, the legal estate thereby vesting in the husband. In such case equity will restrain

<sup>30</sup> *Nicodemus v. Nicodemus*, 41 Md., 529.

<sup>32</sup> *Minnig's Appeal*, 82 Pa. St., 373; *Jordan v. Lanier*, 73 N. C., 90.

<sup>31</sup> *Lanahan v. Gahan*, 37 Md., 105.

<sup>33</sup> *Goodell v. Lassen*, 69 Ill., 145..



the sale of the property under execution against the husband.<sup>34</sup> The necessity of preventing a multiplicity of suits affords another exception to the rule, and will warrant the interposition of the strong arm of equity, even though there be a remedy at law.<sup>35</sup> But to warrant the interference in such cases there must be different persons assailing the same right, and the principles upon which the relief is granted have no application to a repetition of the same trespass by one and the same person, the case being susceptible of compensation in damages.<sup>36</sup>

§ 701. **Conditions necessary to relief.** To warrant the interference of equity in restrain of trespass, two conditions must co-exist: first, complainant's title must be established; and, second, the injury complained of must be irreparable in its nature.<sup>37</sup> And to come within the rule the injury must be of such a nature as not to be susceptible of adequate pecuniary compensation in damages.<sup>38</sup> Nor will equity interfere to restrain a trespasser simply because he is a trespasser, but only because the injury threatened is ruinous

<sup>34</sup> *Smith v. Smith*, 4 Jones Eq., Bright, 24 West Va., 698; *Cresap v. Kemble*, 26 West Va., 603; *Lazzell*

<sup>35</sup> *Coit v. Horn*, 1 Sandf. Ch., 1; *v. Garlow*, 44 West Va., 466, 30 S. E., 171; *Burns v. Mearns*, 44 West Va., 744, 30 S. E., 112; *Becker v. McGraw*, 48 West Va., 539, 37 S. E., 532; *Freer v. Davis*, 52 West Va., 1, 43 S. E., 164, 59 L. R. A., 556, 94 Am. St. Rep., 895; *Norton v. Elwert*, 29 Ore., 583, 41 Pac., 926; *Sharpe v. Loane*, 124 N. C., 1, 32 S. E., 318.

<sup>36</sup> *Deegan v. Neville*, 127 Ala., 471, 29 So., 173, 85 Am. St. Rep., 137; *Hatcher v. Hampton*, 7 Ga., 50; *Chicago Public Stock Exchange v. McClaughry*, 148 Ill., 372, 36 N. E., 88; *Chicago Gen. Ry. Co. v. C., B. & Q. R. Co.*, 181 Ill., 605, 54 N. E., 1026; *Roebbling v. First National Bank*, 30 Fed., 744.

<sup>37</sup> *Gause v. Perkins*, 3 Jones Eq., 177; *Schurmeier v. St. Paul & P. R. Co.*, 8 Minn., 113; *Schoonover v.*

<sup>38</sup> *Weigel v. Walsh*, 45 Mo., 560; *Bethune v. Wilkins*, 8 Ga., 118; *Vanwinkle v. Curtis*, 2 Green Ch., 422; *Shipley v. Ritter*, 7 Md., 408; *Foster, Ex parte*, 11 Ark., 304; *Ross v. Page*, 6 Ohio, 166; *Sharpe v. Loane*, 124 N. C., 1, 32 S. E., 318.

to the property in the manner in which it has been enjoyed and will permanently impair its future enjoyment. And if the title to the *locus in quo* is in doubt, the injunction, if allowed at all, should be only temporary until the title can be determined at law.<sup>39</sup> But where the questions of law and of fact are serious and where the injury resulting to the plaintiff from being denied a preliminary injunction would be great, while the injury to the defendant resulting from the granting of the writ would be insignificant, a preliminary injunction may be allowed to retain matters *in statu quo* until a final determination.<sup>40</sup>

§ 702. **Illustrations of irreparable injury; trespass ripening into easement.** It is frequently a matter of difficulty to determine what constitutes such a degree of irreparable injury as to warrant a court of equity in enjoining what might otherwise seem to be an ordinary act of trespass, for which an adequate remedy at law might be found. But where it is shown that defendant, acting under the orders of the regularly constituted authorities of a municipal corporation, is about to destroy fences, fruit and ornamental trees and shrubbery growing upon premises owned and occupied by plaintiff as a homestead, under an unfounded pretense that they are within the limits of a public street, the threatened acts are so clearly irreparable as to warrant relief in equity by injunction. In such a case a mere money compensation would not afford adequate relief, and the refusal of an injunction would, in effect, be a denial by justice.<sup>41</sup> So the unauthorized and forcible entry upon land owned by and in the possession of plaintiff, and defacing his boundaries and establishing new ones, afford sufficient ground for an

<sup>39</sup> *Echelkamp v. Schrader*, 45 Point, 39 Wis., 160; *Uren v. Walsh*, Mo., 505; *Mayor v. Groshon*, 30 57 Wis., 98, 14 N. W., 902; *Village of Itasca v. Schroeder*, 182 Ill., 192, Md., 436.

<sup>40</sup> *Dimick v. Shaw*, 36 C. C. A., 55 N. E., 50; *Schock v. Falls City*, 347, 94 Fed., 266. 31 Neb., 599, 48 N. W., 468.

<sup>41</sup> *Wilson v. City of Mineral*

injunction.<sup>42</sup> So when the trespass complained of is repeated or continued, in the nature of a nuisance, or when the wrongful acts continued or threatened to be continued may become the foundation of adverse rights and may occasion a multiplicity of suits to recover damages, the case presents such equitable features as to entitle complainant to the aid of an injunction.<sup>43</sup> So, too, a trespass which if continued will ripen into an easement may properly be enjoined.<sup>44</sup> Thus, the tearing down of fences by a highway officer for the purpose of laying out a highway across plaintiff's premises, where none has been established, disturbs plaintiff's possession, and will if continued ripen into an easement; hence equity may properly interpose by injunction in such a case.<sup>45</sup> And where an injunction is granted upon the ground that the trespass may ripen into an easement, the question of damages is immaterial and the relief will be allowed although the act complained of results in no actual or substantial present injury to the plaintiff.<sup>46</sup> But the fact that the trespass, if continued, may give rise to an easement, does not, of itself, afford ground for an injunction in advance of the final hearing.<sup>47</sup>

§ 702 *a*. **Further illustrations.** As further illustrating the doctrine under discussion, it is held that where the acts of trespass are constantly recurring but the injury resulting from each separate act is trifling, so that the damages recoverable for each act would be very small when compared

<sup>42</sup> *Preston v. Preston*, 85 Ky., 16, 456, 26 Pac., 968; *Mott v. Ewing*, 2 S. W., 501. 90 Cal., 231, 27 Pac., 194.

<sup>43</sup> *Johnson v. City of Rochester*, 13 Hun, 285; *Newaygo M. Co. v. Chicago & W. M. R. Co.*, 64 Mich., 114, 30 N. W., 910; *Shaffer v. Stull*, 32 Neb., 94, 48 N. W., 882. <sup>45</sup> *Poirier v. Fetter*, 20 Kan., 47. <sup>46</sup> *Amsterdam Knitting Co. v. Dean*, 162 N. Y., 278, 56 N. E., 757; *Walker v. Emerson*, 89 Cal., 456, 26 Pac., 968; *Mott v. Ewing*, 90 Cal., 231, 27 Pac., 194.

<sup>44</sup> *Poirier v. Fetter*, 20 Kan., 47; *Murphy v. Lincoln*, 63 Vt., 278, 22 Atl., 418; *Amsterdam Knitting Co. v. Dean*, 162 N. Y., 278, 56 N. E., 757; *Walker v. Emerson*, 89 Cal., 456, 26 Pac., 968; *Mott v. Ewing*, 90 Cal., 231, 27 Pac., 194. <sup>47</sup> *McGregor v. Silver King Mining Co.*, 14 Utah, 47, 45 Pac., 1091, 60 Am. St. Rep., 883.

with the expense necessary to prosecute separate actions at law therefor, relief will be granted owing to the inadequacy of the legal remedy.<sup>48</sup> So where a trespass upon land is repeated and continuous and, if continued, will result in the destruction of the substance of the estate, relief is properly allowed.<sup>49</sup> So the repeated removal of plaintiff's fences, coupled with threats of continuing such removal as often as the fences are replaced, defendant being insolvent, will warrant relief by injunction, as well upon the ground of inadequacy of the legal remedy, as for the prevention of a multiplicity of suits.<sup>50</sup> And the relief has been allowed in such case even though the defendant was not insolvent.<sup>51</sup> And the discharge of freight by a steamboat at a private wharf owned by plaintiff, to the constant and serious interruption of his business, will warrant an injunction under a statute authorizing the relief when an injury to real or personal property is threatened which, in the opinion of the court, can not be adequately remedied by an action for damages.<sup>52</sup> And the destruction of a mill-dam which operates plaintiff's mill may be enjoined, defendant being insolvent and unable to respond in damages.<sup>53</sup> So the construction of a tunnel through plaintiff's premises is a trespass of so irreparable a nature as to justify the granting of an injunction.<sup>54</sup> And where plaintiff is lawfully in possession of and entitled to use a wharf upon a navigable water and in con-

<sup>48</sup> *Lembeck v. Nye*, 47 Ohio St., 336, 24 N. E., 686, 8 L. R. A., 578, 21 Am. St. Rep., 828; *Providence, F. R. & N. S. Co. v. City of Fall River*, 183 Mass., 535, 67 N. E., 647; *McClellan v. Taylor*, 54 S. C., 430, 32 S. E., 527.

<sup>49</sup> *Lewis v. Town of North Kingstown*, 16 R. I., 15, 11 Atl., 173, 27 Am. St. Rep., 724; *Miller v. Wills*, 95 Va., 337, 28 S. E., 337; *Hooper v. Doræ C. M. Co.*, 95 Ala., 235, 10

So., 652; *Northern Pac. Ry. Co. v. Cunningham*, 103 Fed., 708.

<sup>50</sup> *Owens v. Crossett*, 105 Ill., 354. And see *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W., 235.

<sup>51</sup> *Pohlman v. Evangelical Church*, 60 Neb., 364, 83 N. W., 201.

<sup>52</sup> *Turney v. Stewart*, 78 Mo., 480.

<sup>53</sup> *Sword v. Allen*, 25 Kan., 67.

<sup>54</sup> *Richards v. Dower*, 64 Cal., 62, 28 Pac., 113.

nection with and as appurtenant thereto to use certain moorings, buoys and anchors, their unauthorized removal by defendants constitutes such an irreparable injury as to warrant an injunction, even though defendants are not shown to be insolvent.<sup>55</sup> So defendant will be enjoined from entering upon a public highway and preventing plaintiff from carrying on the work of paving which he is engaged in doing under a contract with the city, where the trespass is constantly repeated and would subject the plaintiff to a multiplicity of suits at law for redress.<sup>56</sup> And where the defendant has frequently trespassed upon plaintiff's land and has served upon him a written notice of his intention to continue the trespassing as often as the plaintiff seeks to assert his rights, an injunction is properly granted owing to the inadequacy of the remedy at law.<sup>57</sup> So a railway company may have an injunction to restrain hackmen from continually entering its depot against its will for the purpose of soliciting the patronage of its passengers.<sup>58</sup> And one railroad may enjoin another from continually running its engines and cars upon plaintiff's tracks without any right so to do.<sup>59</sup> And an injunction will issue to restrain defendants from constantly entering upon a game preserve owned by the plaintiff and killing the game, thereby destroying the value of the land for the purposes for which plaintiff is using it.<sup>60</sup> And where plaintiff is in lawful possession of a tract of land under a lease from the owner, in which he had sunk a natural gas well from which he is taking gas, the unauthorized digging

<sup>55</sup> *Crescent City W. & L. Co. v. N. H. & H. R. Co. v. Scovill*, 71 Simpson, 77 Cal., 286, 19 Pac., 426. Conn., 136, 41 Atl., 246, 42 L. R.

<sup>56</sup> *Palmer v. Israel*, 13 Mont., 209, A., 157, 71 Am. St. Rep., 159.  
33 Pac., 134.

<sup>57</sup> *Edwards v. Haeger*, 180 Ill., 99, 54 N. E., 176. <sup>59</sup> *Lake Shore & M. S. R. Co. v. Felton*, 43 C. C. A., 189, 103 Fed., 227.

<sup>58</sup> *Boston & M. R. Co. v. Sullivan*, 177 Mass., 230, 58 N. E., 689, 83 Am. St. Rep., 275; *New York*, <sup>60</sup> *Kellogg v. King*, 114 Cal., 378, 46 Pac., 166, 55 Am. St. Rep., 74.



of a well by the defendant in such close proximity as to diminish the flow of gas from the plaintiff's well will be enjoined owing to the impossibility of determining with any degree of accuracy the damages which will result to the plaintiff.<sup>61</sup>

§ 703. **Interference with burial ground.** In conformity with the general principle that an act of trespass for which it is impossible to give an adequate remedy by damages at law may be enjoined in equity, it is held that where land has for many years been held and used by the owner as a family burial ground, defendants may be enjoined from encroaching thereon and from a threatened removal of the remains of persons interred therein. And in such case, the right to equitable relief is based upon the fact that there can be no standard by which to estimate the damages sustained, since the extent of the injury is dependent upon the feelings of the persons aggrieved, and upon their peculiar views of the sacredness of the ground in question.<sup>62</sup> So the invasion or appropriation, without authority, of lands owned

<sup>61</sup> Indianapolis N. G. Co. v. Kibbey, 135 Ind., 357, 35 N. E. 392.

<sup>62</sup> Mooney v. Cooledge, 30 Ark., 640. Mr. Justice Walker observes, p. 642, as follows: "The plaintiffs allege that this acre of land was, and for many years has been the property of their ancestor, and had all the while been claimed and used as a family burial ground; that many of their near relatives and esteemed friends were buried there; that defendants, the owners of Evergreen Cemetery, have extended the cemetery upon this land, fenced it in, laid off part of the land upon which their dead relatives and friends have been buried as an addition to the said cemetery; had given notice to

them to remove the remains of their dead relatives and friends, and were threatening to do so. For such an injury as this there could be no standard by which to estimate the damages sustained. The extent of the injury to be inflicted must depend upon the sympathies and feelings of the parties injured, and their peculiar views as to the sacredness of the spot where the remains rest. Whilst it might be a matter of little moment to some, it might inflict an irreparable injury to others, which money could not compensate. Under the state of case presented, we hold that the suit was properly brought in a court of equity."

by the trustees of a religious organization and used by them for burial purposes, and the attempt to take such property from the owners without authority, and to devote it to another purpose, constitute an injury of such an irreparable nature as to justify the interposition of equity by injunction.<sup>63</sup> And where land was dedicated by a former owner for use as a burial ground, and has been so used for many years, a subsequent owner of the premises may be enjoined from interfering with their use for burial purposes at the suit of residents of the neighborhood having friends buried there, plaintiffs suing for themselves and for all others having a like interest.<sup>64</sup> So where a father buried the remains of his deceased son in his own lot in a cemetery, with the full approval and consent of the widow of the deceased, the widow was enjoined from removing the remains to another place for burial.<sup>65</sup>

§ 704. **Encroachments upon adjacent land; projecting buildings.** Perhaps no cases where preventive relief by injunction has been allowed against the commission of trespasses better illustrate the nature and grounds of the jurisdiction, than those in which the aid of equity is invoked to prevent an encroachment upon complainant's soil by excavating on the part of an adjacent owner, or by the destruction of complainant's wall in building operations upon adjacent premises; and the right to relief in this class of cases is well established.<sup>66</sup> For example, where complainant and those under whom he claims have been for many years in possession of lands, and defendant, an adjacent lot owner, has pulled down the division fence, and is proceeding to ex-

<sup>63</sup> *Beatty v. Kurtz*, 2 Pet., 566; *son*, 22 La. An., 512; *Tribune Association v. The Sun*, 7 Hun, 175.

<sup>64</sup> *Davidson v. Reed*, 111 Ill., 167. See also *Hunt v. Peake*, John Eng.

<sup>65</sup> *Peters v. Peters*, 43 N. J., Eq., Ch., 705; *Chicago, B. & Q. R. Co. v. Porter*, 72 Iowa, 426, 34 N. W.,

<sup>66</sup> *Southmayd v. McLaughlin*, 9 286; *Gobeille v. Meunier*, 21 R. I., C. E. Green, 181; *Marion v. John-* 103, 41 Atl., 1001.

cavate the soil of complainant's land for the purpose of erecting a building partly upon his premises, a fitting case is presented for relief by injunction, the injury going to the destruction of the inheritance.<sup>67</sup> So when defendants, in erecting a building upon a lot adjoining the premises of complainants, are removing bricks from the wall of their building, to its great injury and detriment, the act, although a trespass, is of such an irreparable character, as to warrant an injunction.<sup>68</sup> And the relief may be granted against a public officer, such as a building inspector of a city, who is proceeding in excess of his authority to the commission of an irreparable injury, as by tearing down the wall of a building, when the injury thereby sustained can not be adequately measured or estimated in damages.<sup>69</sup> So, too, where the trespass consists in removing earth and stones from a bank belonging to complainant, and which protects his lands from inundations and irruptions of the sea, he having already obtained a verdict at law for the same trespass, an injunction may be allowed.<sup>70</sup> And where defendant threatens to tear down and remove a portion of complainant's dwelling, which he alleges is built upon his own land, the threatened injury is so irreparable in its nature as to justify relief by injunction.<sup>71</sup> And upon similar principles, where defendant's building, or its foundations, or such parts of it as windows, cornices and the like, project upon or over the adjoining land owned by the plaintiff, a mandatory injunction is properly granted to compel the removal of such projecting parts.<sup>72</sup> And where the en-

<sup>67</sup> *Southmayd v. McLaughlin*, 9 Conn., 662, 55 Atl., 168; *C. E. Green*, 181. *Wilmarth v. Woodcock*, 66 Mich., 331, 33 N. W., 400; *Harrington v. McCarthy*, 169 Mass., 492, 48 N. E., 278; *Hodgkins v. Farrington*, 150 Mass., 19, 22 N. E., 73, 5 L. R. A., 209; *Pile v. Pedrick*, 167 Pa. St., 296, 31 Atl., 646, 647, 46 Am. St. Rep., 677; *Norton v. Elwert*, 29 Ore., 583, 41 Pac., 926; *Gobeille*

<sup>68</sup> *Marion v. Johnson*, 22 La. An., 512.

<sup>69</sup> *Tribune Association v. The Sun*, 7 Hun, 175.

<sup>70</sup> *Chalk v. Wyatt*, 3 Meriv., 688.

<sup>71</sup> *De Veney v. Gallagher*, 5 C. E. Green, 33.

<sup>72</sup> *Norwalk H. & L. Co. v. Ver-*

eroachment consists of a projection above the land as distinguished from one which is upon it, the remedy by ejectment can have no application since there is no interference with the plaintiff's possession so far as the land itself is concerned.<sup>73</sup> But where an occasional stone of the defendant's foundation wall projects a short distance into plaintiff's land below the ground, and the defendant, in building the wall, has endeavored to prevent such an eneroachment, so that the trespass is unintentional and very slight, and where the defendant has offered to pay any sum which the plaintiff may claim, it further appearing that no appreciable damage results to the plaintiff, the court may properly deny injunctive relief and leave the plaintiff to his remedy at law.<sup>74</sup>

§ 705. **Limitations upon the doctrine.** It is, however, important to observe that to warrant a court of equity in granting an injunction at the suit of the owner of realty to prevent an adjacent owner from improving his premises by excavating up to the line of complainants, a clear case of damage, actual or inevitable, should be made to appear. Where, therefore, it is not shown that complainant's soil has been displaced, or that it will necessarily be damaged by making the improvement, equity will not interfere.<sup>75</sup> And when it is sought to restrain defendant from tearing down one of the walls of complainant's house standing upon a strip of ground, the title to which is in dispute, and complainant fails to show any title whatever to the disputed ground, he is not entitled to preventive relief by injunction against the alleged trespass.<sup>76</sup>

*v. Meunier*, 21 R. I., 103, 41 Atl., 1001. In *Long v. Ragan*, 94 Md., 462, 51 Atl., 181, the injunction was not mandatory but merely restrained the defendant from further proceeding with the erection of his building upon plaintiff's land.

<sup>73</sup> *Wilmarth v. Woodcock*, 66 Mich., 331, 33 N. W., 400.

<sup>74</sup> *Harrington v. McCarthy*, 169 Mass., 492, 48 N. E., 278.

<sup>75</sup> *Morrison v. Latimer*, 51 Ga., 519; *McMaugh v. Burke*, 12 R. I., 499.

<sup>76</sup> *Hiss v. McCabe*, 45 Md., 77.

§ 706. **Erection of wooden fence; ditch out of repair; mud and earth.** The erection of a wooden fence on part of complainant's premises is not productive of such serious consequences as to warrant an injunction.<sup>77</sup> Nor will the court interfere where the act complained of consists in permitting a ditch to remain out of repair, whereby water percolates through the bank and floods complainant's meadow, since ample remedy may be had at law.<sup>78</sup> And upon the same principle the throwing up of mud and earth on complainant's land will not be enjoined.<sup>79</sup> But the destruction of a hedge fence upon plaintiff's premises has been held sufficient ground for an injunction.<sup>80</sup>

§ 707. **Complete and incomplete erections; fraudulent and oppressive conduct.** Where the trespass complained of consists in the erection of buildings upon complainant's land, a distinction is taken between the buildings when in an incomplete and when in a finished state. And while the jurisdiction is freely exercised before the completion of the structures,<sup>81</sup> yet if they have been completed the relief will generally be withheld, and the person aggrieved will be left to his remedy by ejectment.<sup>82</sup> But if the conduct of defendants in the construction of the obnoxious works has been fraudulent and oppressive, causing serious injury to complainants and preventing their enjoyment of their property in its original condition, equity may interpose.<sup>83</sup> So an injunction has been granted to prevent the illegal removal of

<sup>77</sup> *Herr v. Bierbower*, 3 Md. Ch., 602; *Long v. Ragan*, 94 Md., 462, 456. 51 Atl., 181; *Baron v. Korn*, 127 N.

<sup>78</sup> *Carlisle v. Stevenson*, 3 Md. Ch., 499. Y., 224, 27 N. E., 804.

<sup>79</sup> *Mulvany v. Kennedy*, 26 Pa. St., 44. <sup>82</sup> *Deere v. Guest*, 1 Myl. & Cr., 516; *Moreland v. Richardson*, 22 Beav., 604.

<sup>80</sup> *Sapp v. Roberts*, 18 Neb., 299, 25 N. W., 96. <sup>83</sup> *Powell v. Aiken*, 4 Kay & J., 343; *Bowser v. Maclean*, 2 DeGex.

<sup>81</sup> *Farrow v. Vansittart*, 1 Rail. C., F. & J., 415.



a school house and the assuming control over a portion of the school territory, the remedy at law being inadequate.<sup>84</sup>

§ 708. **When injunction made mandatory.** Although the jurisdiction of equity by mandatory injunction to compel the restoration of matters *in statu quo* is sparingly exercised, since, if the trespass consists in the erection of structures, the remedy by ejectment is plain,<sup>85</sup> yet a trespass irreparable in its character and of a continuing nature may be restrained by a mandatory injunction, thus restoring things to their original condition.<sup>86</sup> Thus, health officers have been restrained by mandatory injunction from allowing a sewer to remain open.<sup>87</sup> And the manager of a business has been enjoined from excluding the owner of the business from the premises.<sup>88</sup> So, too, a mandatory injunction has been granted to prevent defendant from allowing a building to remain on the roof of the complainant's house which he had erected there.<sup>89</sup> But the relief will not be allowed to compel the rebuilding of a wall which has been overthrown, the remedy being deemed ample at law.<sup>90</sup> And where defendant has been in possession of the *locus in quo* for a period of six years, and the title is in controversy between the par-

<sup>84</sup> District Township of Lodomil-  
lo v. District Township of Cass, 54  
Iowa, 115, 6 N. W., 163.

<sup>85</sup> Deere v. Guest, 1 Myl. & Cr.,  
516; Moreland v. Richardson, 22  
Beav., 604.

<sup>86</sup> Martyr v. Lawrence, 2 DeGex,  
J. & S., 261; Robinson v. Byron,  
1 Bro. C. C., 588; Great R. Co. v.  
Clarence R. Co., 1 Coll., 507; Pow-  
ell v. Aiken, 4 Kay & J., 343; Nor-  
walk H. & L. Co. v. Vernam, 75  
Conn., 662, 55 Atl., 168; Wilmarth  
v. Woodcock, 66 Mich., 331, 33 N.  
W., 400; Harrington v. McCarthy,  
169 Mass., 492, 48 N.E., 278; Hodg-

kins v. Farrington, 150 Mass., 19,  
22 N. E., 73, 5 L. R. A., 209; Pile  
v. Pedrick, 167 Pa. St., 296, 31 Atl.,  
646, 647, 46 Am. St. Rep., 677;  
Norton v. Elwert, 29 Ore., 583, 41  
Pac., 926; Gobeille v. Meunier, 21  
R. I., 103, 41 Atl., 1001; Henderson  
v. Ogden C. R. Co., 7 Utah, 199, 26  
Pac., 1119.

<sup>87</sup> Manchester R. Co. v. Workshop  
Board of Health, 23 Beav., 209.

<sup>88</sup> Eachus v. Moss, 14 W. R., 327.

<sup>89</sup> Martyr v. Lawrence, 3 DeGex,  
J. & S., 261.

<sup>90</sup> Doran v. Carroll, 11 Ir. Ch.,  
379.

ties, equity will decline to interfere by mandatory injunction.<sup>91</sup>

§ 709. **Pulling down buildings; taking stone from quarry.** A lease containing covenants to repair, and at the end of the term to surrender the buildings in good condition, constitutes no bar to an injunction against pulling down the buildings and removing the materials immediately before the expiration of the term.<sup>92</sup> And an injunction and account will be allowed against a trespass consisting in defendant's exceeding a limited right which he holds of taking stone from complainant's quarry, such a trespass being regarded as one which goes to the destruction of the inheritance.<sup>93</sup>

§ 710. **Erection of piers by foreign corporations enjoined.** A foreign corporation may be restrained from taking possession of the land under water in a harbor over which a state has jurisdiction, and from erecting piers and docks thereon, the injury being such as to warrant a court of equity in interfering in behalf of the people.<sup>94</sup>

§ 711. **Extinguishment of interest in common.** Where one's interest in a common has become extinguished, he will not be allowed to become a trespasser upon the rights of others in the common, and an injunction may issue to prevent him from so doing.<sup>95</sup>

§ 712. **Injunction not granted in case of forcible entry and detainer.** An injunction being a preventive remedy, and not used to compel the undoing of what has already been done, it will not be granted in a simple case of trespass by forcible entry and detainer, the remedy at law being regarded as fully adequate to such a case.<sup>96</sup>

§ 713. **Remedy at law; erection of trestle work; taking stone from ledge.** Equity will not depart from the well

<sup>91</sup> Gaunt v. Fynney, L. R. 8 Ch., 8.

<sup>94</sup> People v. Central R. R., 48 Barb., 478.

<sup>92</sup> Mayor v. Hedger, 18 Ves., 355.

<sup>95</sup> Bell v. Ohio & P. R. Co., 25 Pa.

<sup>93</sup> Thomas v. Oakley, 18 Ves., 184.

St., 161.

<sup>96</sup> Wangelin v. Goe, 50 Ill., 459.

settled rule of leaving the parties to their remedy at law for acts of trespass committed on lands, unless there are some special circumstances set up in the bill, and where it is not shown that the remedy at law is inadequate.<sup>97</sup> And the erection of a trestle work of a railway in a public street is not such a trespass as will authorize an injunction, where the erection is capable of being readily removed.<sup>98</sup> So the taking of stone from a ledge on complainant's premises, being susceptible of pecuniary compensation, and not being shown to be destructive of the estate, will not be enjoined.<sup>99</sup> But the owner of lands over which a highway is being constructed may restrain the digging of pits in the line of the highway below the proposed grade, and the removal of gravel therefrom with which to cover the roadway upon lands not owned by plaintiff.<sup>1</sup>

**§ 714. Interference with church property; when injunction perpetuated.** Trustees of a church may enjoin pretended trustees from intermeddling with the church property where

<sup>97</sup> *Wilson v. Hughell, Morris* (Iowa), 461.

<sup>98</sup> *Schurmeier v. St. Paul & P. R. Co.*, 8 Minn., 113.

<sup>99</sup> *Jerome v. Ross*, 7 Johns. Ch., 315. In this case canal commissioners being authorized by statute to enter upon any lands contiguous to the canals, and to dig for stone and other materials necessary for the prosecution of their work, dug up and removed stone from a ledge of rock on complainant's premises, who thereupon filed a bill for an injunction. Kent, Chancellor, in finally disposing of the case, says: "The objection to the injunction, in cases of private trespass, except under very special circumstances, is, that it would be productive of public inconvenience, by drawing cases of ordinary trespass within

the cognizance of equity, and by calling forth, upon all occasions, its power to punish by attachment, fine and imprisonment, for a further commission of trespass, instead of the more gentle common law remedy by action and the assessment of damages by a jury. In ordinary cases this latter remedy has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless."

<sup>1</sup> *Robert v. Sadler*, 104 N. Y., 229, 10 N. E., 428.

the trespass goes to the destruction of the property in the character in which it was enjoyed.<sup>2</sup> And upon satisfactorily establishing the legal right and its violation a perpetual injunction may be awarded against a trespass.<sup>3</sup>

§ 715. **Interference with possession; trespass ripening into nuisance.** Equity will not restrain interference with complainant's possession of his premises when the indirect effect of the injunction would be to reinstate complainant in possession, the remedy at law being ample.<sup>4</sup> But a trespass which, from its long continuance, has grown into a nuisance, may be enjoined to prevent multiplicity of suits.<sup>5</sup>

<sup>2</sup> *Trustees v. Hoessli*, 13 Wis., 348. Complainants, being trustees of an incorporated religious society, asked a perpetual injunction against certain parties pretending to be trustees to restrain them from intermeddling with the church property. It was held on demurrer that the action was properly brought by the trustees in their official capacity and not in the name of the state; also that a sufficient cause of action was shown to warrant the interference of a court of equity. Cole, J., observes: "The general rule undoubtedly is, that in cases of private trespass an injunction would not be granted, for the reason that the aggrieved party has an adequate common law remedy by action where proper damages could be assessed by a jury. In ordinary cases this was found to be sufficient for the protection of property. 'But in cases of a peculiar nature, where the mischief was irremediable, which damages could not compensate, or where the injury reached to the very substance and value of the estate, and went

to the destruction of it in the character in which it was enjoyed,' then courts of equity would grant an injunction to prevent the injury complained of. *Beatty v. Kurtz*, 2 Peters, 566; *Jerome v. Ross*, 7 Johns. Ch., 315; *Varick v. Mayor*, 4 Ib., 53. Now it must be admitted that the circumstances of this case are so special, the nature and use of the property itself are so peculiar, that an ordinary action of trespass would furnish no adequate compensation for an injury to the possession. For would any mere pecuniary damages furnish any compensation to a religious society for repeated and constant acts of trespass upon its property and temporalities? Most clearly not. The entire value of such property consists in its free and undisturbed use and enjoyment for religious worship."

<sup>3</sup> *McLaughlin v. Kelly*, 22 Cal., 211; *Lowndes v. Bettie*, 33 L. J. Ch., 451.

<sup>4</sup> *Akrill v. Selden*, 1 Barb., 316.

<sup>5</sup> *Mitchell v. Dors*, 6 Ves., 147; *Hanson v. Gardiner*, 7 Ves., 305.

§ 716. **Removal of asphaltum; landing of passengers; dissolution of injunction.** The removal of asphaltum from complainant's land, thus depriving him of a part of his inheritance, which can not be replaced, affords ground for an injunction.<sup>6</sup> And upon similar grounds the relief may be granted to prevent the removal of earth from plaintiff's premises for the manufacture of brick.<sup>7</sup> But the landing of passengers from a steamboat at complainant's dock does not constitute an injury so irreparable as to call for relief in equity.<sup>8</sup> And an injunction granted against waste will be regarded as a mere injunction against trespass, on answer showing no privity of title, and the equity of the bill being denied, a dissolution follows as of course.<sup>9</sup>

§ 717. **Insolvency; continuing act.** Insolvency of the trespasser affords additional ground for the interference, since his inability to respond in damages renders the remedy at law ineffectual.<sup>10</sup> And an act which, in itself, might not result in serious damage, may, from its continuance, constitute a trespass resulting in irreparable injury.<sup>11</sup> And where the trespass consists of continuous and repeated acts, which can be redressed at law only by a multiplicity of suits, an injunction may be granted.<sup>12</sup> But a trespass will not be enjoined solely upon the ground of the insolvency of the trespasser, when it does not appear that adequate relief may not be had by an action for damages.<sup>13</sup>

§ 718. **When plaintiff left to remedy at law.** When plaintiff is permitted to maintain an action at law for trespasses

<sup>6</sup> *More v. Massini*, 32 Cal., 590.

<sup>7</sup> *Bates v. Slade*, 76 Ga., 50.

<sup>8</sup> *New York P. & D. Establishment v. Fitch*, 1 Paige, 97.

<sup>9</sup> *Stewart v. Chew*, 3 Bland, 440.

<sup>10</sup> *Musselman v. Marquis*, 1 Bush, 463; *Milan Steam Mills v. Hickey*, 59 N. H., 241; *Long v. Kasebeer*, 28 Kan., 226; *Champ v. Kendrick*, 130 Ind., 549, 30 N. E.,

787; *Hanly v. Watterson*, 39 West Va., 214, 19 S. E., 536.

<sup>11</sup> *Hopkins v. Chaddick*, 18 L. T., 236.

<sup>12</sup> *Mills v. New Orleans Seed Co.*, 65 Miss., 391, 4 So., 298. And see, *ante*, § 697.

<sup>13</sup> *Mechanics Foundry of San Francisco v. Ryall*, 75 Cal., 601, 17 Pac., 703. And see, *ante*, § 18.



committed upon land from which he has been disseized and of which defendant is in the adverse possession, a court of equity will not interfere by injunction to prevent the commission of threatened trespasses, but will leave the party aggrieved to pursue his remedy at law.<sup>14</sup>

§ 719. **Distinction between articles of necessity and of luxury.** A distinction has been taken between trespasses consisting in the removal of such articles from one's premises as are necessary to their enjoyment, and such as are merely articles of convenience or luxury; and while in the former case the injury would prove irreparable, and the injunction is therefore granted,<sup>15</sup> in the latter, the articles being merely articles of convenience, ample remedy may be had at law for their removal, and equity will not interfere.<sup>16</sup>

§ 720. **When discretion of inferior court not interfered with.** It is held that an appellate court will not control the discretion of an inferior court in refusing to grant an interlocutory injunction to restrain the commission of a trespass, when defendants in the action are fully able to respond in damages upon the final hearing of the cause.<sup>17</sup>

§ 721. **When interlocutory injunction retained to the hearing.** When the threatened trespass would inflict great and irreparable injury upon complainant's property and is of such a character as equity may properly enjoin, the bill denying defendant's right, and defendant by his answer showing such circumstances of acquiescence on his part as to render his assertion of the right inequitable, the preliminary injunction may properly be retained until the final hearing.<sup>18</sup> So when complainant claimed the exclusive right to take oysters from a particular part of a bay, which had been

<sup>14</sup> *Felton v. Justice*, 51 Cal., 529;  
*Taylor v. Clark*, 89 Fed., 7.

<sup>15</sup> *Witmer's Appeal*, 45 Pa. St.,  
455.

<sup>16</sup> *Clark's Appeal*, 62 Pa. St., 447.

<sup>17</sup> *Summerville Co. v. The Augusta Co.*, 56 Ga., 527.

<sup>18</sup> *Johnston v. Hyde*, 10 C. E.  
Green, 454.

planted, staked off and claimed by him exclusively, an injunction restraining defendants from taking oysters therefrom was regarded as proper to be continued until the hearing, when the question of right could be finally determined, most of the defendants being insolvent.<sup>19</sup> And it has been held where a preliminary injunction is granted against a trespass of an irreparable nature, and the effect of dissolving it would be to change the possession of real property, that it should be retained until the hearing.<sup>20</sup>

§ 722. **Requisites of bill; damages awarded in same action.**

When relief is sought by injunction against the commission of a threatened trespass, it is not sufficient that the bill contains mere general averments of irreparable mischief, but the facts constituting such mischief should be set forth.<sup>21</sup> And in the absence of any allegations that the trespass is a continuing one, or is likely to be continued, the injunction will be withheld.<sup>22</sup> But it is a sufficient setting forth of complainant's title if he alleges himself to be the owner in fee simple by purchase and to be in possession.<sup>23</sup> And upon a bill to restrain a threatened trespass, the court having granted an injunction may, to prevent a multiplicity of suits, entertain jurisdiction in the same action to fix the damages sustained by the injury in question before the injunction was granted.<sup>24</sup>

§ 722 *a*. **Trespass upon public lands enjoined.** Encroachments in the nature of trespasses upon the public lands of the United States may be enjoined at the suit of the government.<sup>25</sup> And in such cases the injunction may be made

<sup>19</sup> *Britton's Adm'r v. Hill*, 12 C. E. Green, 389.

<sup>20</sup> *Vanwinkle v. Curtis*, 2 Green Ch., 422.

<sup>21</sup> *Boedicker v. East*, 24 La. An., 154.

<sup>22</sup> *Winslow v. Nayson*, 113 Mass., 411.

<sup>23</sup> *White v. Flannigan*, 1 Md., 525; *Waldron v. Marsh*, 5 Cal., 119; *Carlisle v. Stevenson*, 3 Md. Ch., 499.

<sup>24</sup> *United States v. Brighton Rancho Co.*, 25 Fed., 465; S. C., 26 Fed., 218; *United States v. Cleveland & C. C. Co.*, 33 Fed., 323.

<sup>25</sup> *Coker v. Simpson*, 7 Cal., 340.

mandatory to compel defendant to remove obstructions, such as fences, which he has erected upon the public domain.<sup>26</sup>

§ 722*b*. **Adoption of legal remedy as test to relief.** An examination of the later authorities upon the subject of injunctions against trespass discloses a decided tendency to adopt the adequacy or inadequacy of the legal remedy as the sole and ultimate test as to the right to equitable relief in such cases, and it will be seen that the question of irreparable injury is of importance only in so far as it bears upon this fundamental question of the legal remedy. While the courts have, perhaps, never in express terms laid this down as the sole criterion, it will be seen that injunctive relief is freely granted regardless of the irreparable character of the injury inflicted, where it appears for any reason that full and complete redress may not be had in a court of law. Such considerations as those of a multiplicity of suits, the continuing nature of the trespass, the insolvency of the defendant, numerous acts where the damages for a single one would be insignificant, and the difficulty of proving or measuring the damages, all of which concern the remedy and not the wrong, and all of which have come to be of such controlling force, show beyond question that it is not so much the nature or kind of the wrong complained of as it is the relative efficiency of the legal as compared with the equitable remedy, which furnishes the fundamental, governing rule by which courts of equity are guided in administering preventive relief against the commission of a trespass.

<sup>26</sup> United States *v.* Brighton Goodnight, 70 Tex., 682, 11 S. W., Rancho Co., 25 Fed., 465; S. C., 119.

26 Fed., 218. See also State *v.*

## II. CUTTING TIMBER.

- § 723. A strong case of destruction or of irreparable mischief must be made out.
724. Cutting of all the wood on premises may be enjoined.
725. Rule as to timber already cut.
726. Possession coupled with title.
727. Fruit trees and ornamental shrubbery; insolvency; value of property.
728. State of plaintiff's title.
729. Fraud a ground for relief.

§ 723. **A strong case of destruction or of irreparable mischief must be made out.** Although the modern doctrine of courts of equity in restraining trespass is, as we have seen, more liberal than the ancient, yet a strong case of destruction or irreparable mischief must be made out, since courts of law are, in general, the proper forum for disposing of actions of trespass. And the fact that the title to the premises is disputed, as between the devisee and an heir at law, constitutes an effectual bar to the granting of an injunction against the cutting of timber.<sup>1</sup> Nor will the relief be granted when plaintiff fails to show by his bill a good title to the premises.<sup>2</sup> Even the cutting and removal of timber from pine lands, valuable chiefly for the timber, is not such a case of irreparable injury as will warrant an injunction, where defendant claims part of the land by adverse title, and the real ownership is in doubt.<sup>3</sup> So equity will not enjoin the cutting of timber from lands which are valuable chiefly for mines.<sup>4</sup> Nor will the relief be granted where it

<sup>1</sup> *Smith v. Collyer*, 8 Ves., 89.

*Lumber Co.*, 99 N. C., 11, 5 S. E.

<sup>2</sup> *Cox v. Douglass*, 20 West Va., 175; *Schoonover v. Bright*, 24 West Va., 698.

19. As to the right to enjoin the cutting and removal of timber in Kentucky, see *Hillman v. Hurley*,

<sup>3</sup> *West v. Walker*, 2 Green Ch.,

82 Ky., 626.

279. See also *Powell v. Rawlings*, 38 Md., 239; *Roper Lumber Co. v. Wallace*, 93 N. C., 22; *Lewis v.*

<sup>4</sup> *Heaney v. Butte & M. C. Co.*, 10 Mont., 590, 27 Pac., 379.

is not shown that the injury is irreparable.<sup>5</sup> And where a statute gives ample remedy in addition to that at common law, equity will not restrain the cutting and removal of timber, where it does not appear that defendants are insolvent.<sup>6</sup> So, too, if the allegations of the bill are vague and general as to the threatened removal of the timber, and are made upon belief, the court will not interpose.<sup>7</sup> Nor will mere threats of defendant to cut wood on complainant's land suffice to perpetuate an injunction already granted.<sup>8</sup> And it has been held that the working of turpentine trees and cutting timber for staves, the land being valuable only for this purpose, will not warrant the relief in the absence of any proof of defendant's insolvency, since the remedy at law is ample.<sup>9</sup>

§ 724. **Cutting of all the wood on premises may be enjoined.** Where, however, the trespass consists in the cutting of timber upon complainant's lands, going to the destruction of that which is essential to the value of the estate, and to the destruction of the estate itself in the character in which it has been enjoyed, a fitting case is presented for relief by injunction.<sup>10</sup> And the destruction of all the timber on complainant's premises, where wood and timber are needed for the enjoyment of the property, will be enjoined, even though damages might be had at law, on the ground that the owner is thereby deprived of the use of his prop-

<sup>5</sup> *Myers v. Hawkins*, 67 Ark., 413, 56 S. W., 640.

<sup>6</sup> *Cowles v. Shaw*, 2 Iowa, 496.

<sup>7</sup> *Cornelius v. Post*, 1 Stockt., 196.

<sup>8</sup> *Woods v. Kirkland*, 2 La. An., 337.

<sup>9</sup> *Gause v. Perkins*, 3 Jones Eq., 177; *McCormick v. Nixon*, 83 N. C., 113; *Carney v. Hadley*, 32 Fla., 344, 14 So., 4, 22 L. R. A., 233, 37 Am. St. Rep., 101.

<sup>10</sup> *Fulton v. Harman*, 44 Md.,

251; *Wadsworth v. Goree*, 96 Ala., 227, 10 So., 848; *Griffith v. Hilliard*, 64 Vt., 643, 25 Atl., 427; *Sautee River Cypress Lumber Co. v. James*, 50 Fed., 360; *King v. Stuart*, 84 Fed., 546; *King v. Campbell*, 85 Fed., 814. And see *Kelly v. Robb*, 58 Tex., 377; *Camp v. Dixon*, 112 Ga., 872, 38 S. E., 71, 52 L. R. A., 755. As to the right to relief when the title is in dispute, see, *ante*, §



erty in the manner in which he has been accustomed to enjoy it. Nor will the relief be withheld because the bill omits to charge the injury as irreparable, provided sufficient facts are alleged to satisfy the court that such would be the case.<sup>11</sup> And the destruction of forest trees is such an irreparable injury as will authorize the interference.<sup>12</sup> So the cutting and removal of growing walnut trees from plaintiff's premises, which he had reserved for a timber lot, may be enjoined as a trespass of such a nature as not to be susceptible of adequate compensation in an action for damages.<sup>13</sup> And where an appeal is pending from a decree which adjudicates the question of title to timber lands, and, pending the appeal, the appellee enters upon the lands and proceeds to cut the timber which is their chief value, an injunction will be granted restraining such trespass until the final determination of the appeal.<sup>14</sup> But if complainant is in possession, with adequate remedy at law for the cutting of his timber, equity will not interfere.<sup>15</sup>

<sup>11</sup> *Davis v. Reed*, 14 Md., 152.

<sup>12</sup> *De la Croix v. Villere*, 11 La. An., 39.

<sup>13</sup> *Thatcher v. Humble*, 67 Ind., 444.

<sup>14</sup> *Wood v. Braxton*, 54 Fed., 1005.

<sup>15</sup> *Stevens v. Beekman*, 1 Johns. Ch., 318. This was a bill to restrain defendants from cutting timber, their only claim of title being from the plaintiff in an action of ejectment pending and undetermined. Kent, Chancellor, held as follows: "This is a case of an ordinary trespass upon land and cutting down the timber. The plaintiff is in possession and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by

injunction; and if the precedent were once set, it would lead to a revolution in practice; for trespasses of this kind are daily and hourly occurring. I doubt exceedingly whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. Such cases are generally of local cognizance, and drawing them into this court would be very expensive and otherwise inconvenient. Lord Eldon said that there was no instance of an injunction in trespass until a case before Lord Thurlow, relative to a mine, and which was a case approaching very nearly to waste, and where there was no dispute about the right. Lord Thurlow had great difficulty as to injunc-

§ 725. **Rule as to timber already cut.** The disposition of timber already cut at the time of obtaining the injunction may be taken into consideration by the court in granting the relief. Thus, it is held that the patentee of public lands, while he may restrain the future cutting of timber upon his premises, will not be allowed to enjoin the removal of timber which had been cut before he obtained his patent.<sup>16</sup> Upon the other hand, where an action of ejectment is pending to determine the disputed question of title to the *locus in quo*, the defendant may be enjoined, not only from cutting the timber, but from removing that which is already cut.<sup>17</sup>

§ 726. **Possession coupled with title.** While equity will not restrain the commission of a trespass upon realty unless the right is clear and the mischief irreparable,<sup>18</sup> yet where there has been a long and undisturbed possession of the premises under title deducible of record, such possession, coupled with unquestioned evidence of title, will authorize the relief as against a mere trespasser without color of right.<sup>19</sup>

§ 727. **Fruit trees and ornamental shrubbery; insolvency; value of property.** The destruction of fruit trees and ornamental shrubbery is an injury to the realty so irreparable in its nature that equity will interfere.<sup>20</sup> Nor does it make any difference whether the trees were planted by the owner for shade or ornament, or whether they were so situated naturally as to serve this purpose.<sup>21</sup> And it is not necessary

tions for trespass; and, though Lord Eldon thought it surprising that the jurisdiction by injunction was taken so freely in waste and not in trespass, yet he proceeded with the utmost caution and diffidence, and only allowed the writ in solitary cases of a special nature, and where irreparable damage might be the consequence if the act continued."

<sup>16</sup> Peck v. Brown, 5 Nev., 81.

<sup>17</sup> King v. Campbell, 85 Fed., 814.

<sup>18</sup> Gause v. Perkins, 3 Jones Eq., 177; Schurmeier v. St. Paul & P. R. Co., 8 Minn., 113.

<sup>19</sup> Falls V. W. P. Co. v. Tibbetts, 31 Conn., 165.

<sup>20</sup> Daubenspeck v. Grear, 18 Cal., 443.

<sup>21</sup> Shipley v. Ritter, 7 Md., 408.

in a bill filed to restrain trespass to the realty to allege absolute insolvency of the defendant, but it will suffice that such facts appear as show that a judgment for damages would be entirely worthless.<sup>22</sup> And the jurisdiction of the court in this class of cases does not depend upon the value of the property destroyed, but upon the question whether its destruction would materially impair the enjoyment of the property as held and occupied at the time of the commission of the trespass.<sup>23</sup>

§ 728. **State of plaintiff's title.** Equity will not restrain the cutting of timber when complainant does not expressly aver in his bill title in himself to the premises in question, and when he does not allege the insolvency of defendants, or otherwise show that he has not a complete remedy at law.<sup>24</sup> Nor will the court interfere when the bill avers that complainant has sold the premises on which the timber is being cut.<sup>25</sup> And when both parties claim title to the land upon which the timber is being cut by defendant, and the proof does not show that the trees have any peculiar value, or that the enjoyment of the property will be so affected by the cutting as to render the injury irreparable, an injunction will be refused, and complainant will be left to follow his remedy at law.<sup>26</sup> So when complainant claims to be entitled under an agreement with defendant's grantors to remove timber from defendant's premises, and seeks to restrain defendant from the cutting and removal of the timber, the relief will be denied upon the ground that the legal remedy by an action for damages is adequate.<sup>27</sup> And where complainant obtains an interlocutory injunction to prevent defendant from cutting timber upon premises claimed by both

<sup>22</sup> *Hicks v. Compton*, 18 Cal., 206.

<sup>25</sup> *McMillan v. Ferrell*, 7 West

<sup>23</sup> *Shipley v. Ritter*, 7 Md., 408.

Va., 223.

<sup>24</sup> *McMillan v. Ferrell*, 7 West Va.,

<sup>26</sup> *Powell v. Rawlings*, 38 Md.,

223; *Western M. & M. Co. v. Vir-*

239.

*ginia C. C. Co.*, 10 West Va., 250.

<sup>27</sup> *Griffin v. Winne*, 10 Hun, 571.

parties, but the only proof of complainant's title adduced upon the hearing is an award which the court finds to be invalid by reason of misconduct of the arbitrator, and all the allegations of complainant's title are denied by the answer and unsustained by proof, it is proper to dissolve the injunction and to dismiss the bill.<sup>28</sup>

§ 729. **Fraud a ground for relief.** The element of fraud upon the part of defendant in connection with the cutting of timber may constitute sufficient ground for extending relief by injunction. Thus, when a judgment creditor takes from his debtor a conveyance of his lands in satisfaction of the judgment, and a third person, with full knowledge of the facts, secretly and fraudulently obtains from the judgment debtor a conveyance of the timber growing upon the lands conveyed, such person may be enjoined from cutting and removing the timber, the relief being based in such case upon the well established jurisdiction of equity in matters of fraud.<sup>29</sup>

<sup>28</sup> *Tate v. Vance*, 27 Grat., 571.

<sup>29</sup> *Raines v. Dunning*, 41 Ga., 617.

## III. TRESPASS TO MINES.

§ 730. Greater latitude in cases of mines.

731. Complainant's title; removal of ore; expenditures by defendant.

732. Title must be established at law.

733. Flowing of refuse matter may be enjoined; when perpetual injunction awarded.

734. Working through into another's mine; digging ore on public land.

735. Placer mines.

736. Rights of surface owner.

737. Reducing pillars in mine; mandatory injunction.

738. Diversion of water from tunnel.

§ 730. **Greater latitude in cases of mines.** In the case of trespass to mining property greater latitude is allowed courts of equity than in restraining ordinary trespasses to realty, since the injury goes to the immediate destruction of the minerals which constitute the chief value of this species of property. Where, therefore, the trespass consists in the removal of ore from complainant's mines, the legal title being clearly established in complainants, they are entitled to an injunction, even though an action at law would lie.<sup>1</sup> And upon similar principles equity will interfere by injunction to restrain the removal of

<sup>1</sup> *Merced M. Co. v. Fremont*, 7 Cal., 317; *Scully v. Rose*, 61 Md., 408; *Silva v. Rankin*, 80 Ga., 79, 4 S. E., 756; *Lockwood v. Lunsford*, 56 Mo., 68; *Anderson v. Harvey*, 10 Grat., 386; *Allen v. Dunlap*, 24 Ore., 229, 33 Pac., 675; *Muldrick v. Brown*, 37 Ore., 185, 61 Pac., 428; *Oolagh Coal Co. v. McCaleb*, 15 C. C. A., 270, 68 Fed., 86; *Dimick v. Shaw*, 36 C. C. A., 347, 94 Fed., 266. And see *Hammond v. Winchester*, 82 Ala., 470, 2 So., 892; *Chambers v. Alabama Iron Co.*, 67 Ala., 353; *Nichols v. Jones*, 19 Fed., 855; *Cheesman v. Shreve*, 37 Fed., 36. *Anderson v. Harvey*, 10 Grat., 386, was a bill for an injunction to restrain the removal of ore from complainant's mines. Daniel, J., pronouncing the opinion of the court, says: "The practice of courts of equity of interfering in such cases by way of injunction, is one comparatively of recent origin; but the jurisdiction is



stone from a quarry.<sup>2</sup> And although the jurisdiction of the court over the parties is put in issue by plea, if the bill contains sufficient averments of jurisdiction the court may award a temporary injunction to stay the mischief until the question raised by the plea can be determined.<sup>3</sup>

§ 731. **Complainant's title; removal of ore; expenditures by defendant.** While the general rule requiring complainant to show a good title extends to trespass against mines, yet it may be relaxed somewhat in a case of irreparable mischief, where the injury goes to the destruction of the very substance of the estate. And in such a case the injunction will not be limited to the prevention of future trespass, but will restrain the removal of ore already extracted from the mine.<sup>4</sup> And where the title is in dispute and the injury would be great, an injunction may be granted pending the determination of the question of title in an action at law.<sup>5</sup> If, however, defendants have been in possession for a

now fully recognized and well established by cases both in England and America. *Mitchell v. Dors*, 6 Ves. R., 147; *Hanson v. Gardiner*, 7 Ves. R., 305; *Thomas v. Oakley*, 18 Ves. R., 184; 3 Daniel's Ch. Pr., 1631-2; *Stevens v. Beekman*, 1 John. Ch. R., 318; *Jerome v. Ross*, 7 John. Ch. R., 315; *Smith v. Pettingill*, 15 Verm. R., 84. The land upon which the trespass is alleged to be committed is proved to be of little or no value except for the iron ore found on it, which is proved to be of an excellent quality. The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it. The fact proved by the appellant that the value of the ore per load could be readily estimated, does not deprive a court

of equity of its right to interfere in the case by way of injunction. The same might be shown in most cases of the kind. The products of most mines have a value already fixed or easy of ascertainment by proof; yet it was in prevention of like trespasses to this very species of property, mines of ore, coal, etc., that the jurisdiction in question had its origin and still continues to be most frequently exercised."

<sup>2</sup> *Norton v. Snyder*, 4 Thomp. & C., 330.

<sup>3</sup> *Fremont v. Merced M. Co.*, McAl. C. C., 267.

<sup>4</sup> *United States v. Parrott*, McAl. C. C., 271, and cases cited; *Erhardt v. Boaro*, 113 U. S., 537.

<sup>5</sup> *Thomas v. Nantahala M. & T. Co.*, 7 C. C. A., 330, 58 Fed., 485. And see, *ante*, § 698.

considerable time, and have expended large sums of money in developing the mine, the injunction will not be allowed except upon a very strong showing.<sup>6</sup> And where complainant seeks to restrain the mining and taking of ores from mineral lands, but his only right or title is based upon a parol lease or license, the proof in support of which is not clear or satisfactory, an injunction should not be allowed.<sup>7</sup> Nor will equity interfere where it does not appear that the trespass complained of consists in the removal or threatened removal of ore or in some other act going to the injury or destruction of the mine.<sup>8</sup> Nor will defendants be enjoined from an alleged trespass, resulting from their preparations for mining coal, in which complainant has allowed them to proceed for two years, and to expend considerable sums of money, without objection.<sup>9</sup>

§ 732. **Title must be established at law.** The jurisdiction in restraint of trespass to mines is not an original jurisdiction of equity, under which the court would be justified in trying the title to the mines themselves, and the party aggrieved must therefore first establish his title at law, or show satisfactory reason for not doing so.<sup>10</sup> And an injunction has been refused when defendants claimed under an adverse title, and when plaintiffs had allowed nearly a year to pass, after defendants had begun working the mine, before seeking relief.<sup>11</sup> So it is proper to refuse the injunction when plaintiff's right is by no means clear, and when his remedy at law is adequate.<sup>12</sup> So an injunction should be refused where

<sup>6</sup> *Real Mining Co. v. Pond Mining Co.*, 23 Cal., 82. And see *Bishop v. Baisley*, 28 Ore., 119, 41 Pac., 937.

<sup>7</sup> *Clegg v. Jones*, 43 Wis., 482.

<sup>8</sup> *Parker v. Furlong*, 37 Ore., 248, 62 Pac., 490.

<sup>9</sup> *Birmingham C. Co. v. Lloyd*, 18 Ves., 515.

<sup>10</sup> *Irwin v. Davidson*, 3 Ired. Eq., 311; *Smith v. Jameson*, 91 Mo., 13, 3 S. W., 212. But see, *contra*, *New Jersey Z. & I. Co. v. Trotter*, 38 N. J. Eq., 3.

<sup>11</sup> *Haigh v. Jaggard*, 2 Coll., 231.

<sup>12</sup> *Howe v. Rochester I. M. Co.*,

the line beyond which the defendant must cease operations can not be ascertained with precision and certainty.<sup>13</sup> And when defendants are in possession under claim of title made in good faith, it is proper to refuse an injunction and to leave the parties to their remedy at law to determine the question of title.<sup>14</sup> It is not necessary, however, that the owner should have actually established his title by an action at law, and if he makes out a good *prima facie* title, which is not controverted by defendant, and shows that those under whom he claims have been in possession and use of the mine for a long period of years, he is entitled to an injunction to prevent such depredations upon his mine as are likely to result in irreparable injury.<sup>15</sup> And it is proper to grant an injunction *pendente lite* to restrain defendants from working their mines in such manner as to endanger that of plaintiffs, with directions to plaintiffs to bring an action to establish their title at law.<sup>16</sup>

§ 733. **Flowing of refuse matter may be enjoined; when perpetual injunction awarded.** The jurisdiction is not confined to restraining the removal of ore, but equity will interfere in behalf of prior occupants of mining claims, to restrain the flowing of refuse matter over their claims by adjoining owners.<sup>17</sup> So a company engaged in mining in the vicinity of plaintiff's premises may be restrained from flooding and covering plaintiff's land with the sand, gravel and debris from such

<sup>13</sup> St. Louis M. & M. Co. v. Montana M. Co., 58 Fed., 129.

<sup>14</sup> Leininger's Appeal, 106 Pa. St., 398. It is held in North Carolina, where defendants are in possession of and working a mine claiming as tenants in common with plaintiffs, that it is improper to enjoin defendants in the first instance from working the mine, and that the appropriate remedy in such case is by the appointment of

a receiver. Parker v. Parker, 82 N. C., 165.

<sup>15</sup> West Point Iron Co. v. Reymer, 45 N. Y., 703.

<sup>16</sup> Duke of Beaufort v. Morris, 6 Hare, 340.

<sup>17</sup> Logan v. Driscoll, 19 Cal., 623. But see Lord's Executors v. Carbon I. M. Co., 38 N. J. Eq., 452; McCauley v. McKeig, 8 Mont., 389, 21 Pac., 22.

mines, thereby rendering it valueless for agricultural purposes.<sup>18</sup> And if the answer admits the entry and working of complainant's mine, but denies his title, upon satisfactory proof of his title a perpetual injunction should be awarded.<sup>19</sup>

§ 734. **Working through into another's mine; digging ore on public land.** Where one in digging coal upon his own premises has worked through into the ground of another, he may be enjoined from proceeding farther.<sup>20</sup> And the digging of lead ore from the public lands of the United States, is such a trespass as will warrant the interference of equity in behalf of the government.<sup>21</sup> So a state may enjoin persons from digging phosphate rock and deposits from the bed of a navigable stream within the state.<sup>22</sup>

§ 735. **Placer mines.** It is thus apparent that courts of equity are inclined to a somewhat liberal use of the remedy by injunction to prevent trespasses to mines, the relief being granted for the prevention of irreparable injury resulting as well from the character of the property as from the nature of the trespass. And the relief is regarded as peculiarly applicable to the case of a placer mine, the value of which consists in auriferous deposits, which may be worked out and removed without leaving any evidence of their value upon which to base an accounting. Where, therefore, plaintiffs by their location have acquired a right to possess such placer mines and to appropriate the minerals therein,

<sup>18</sup> *Hobbs v. Amador & S. C. Co.*, 66 Cal., 161, 4 Pac., 1147. See also *People v. Gold Run D. & M. Co.*, 66 Cal., 155, 4 Pac., 1150.

<sup>19</sup> *McLaughlin v. Kelly*, 22 Cal., 211.

<sup>20</sup> *Mitchell v. Dors*, 6 Ves., 147. Says Lord Eldon: "That is trespass, not waste. But I will grant the injunction upon the authority of a case before Lord Thurlow; a person, landlord of two closes, had

let one to a tenant, who took coal out of that close, and also out of the other, which was not demised; and the difficulty was, whether the injunction should go as to both; and it was ordered as to both."

<sup>21</sup> *United States v. Gear*, 3 How., 121.

<sup>22</sup> *Coosaw Mining Co. v. South Carolina*, 144 U. S., 550, 12 Sup. Ct. Rep., 689, affirming S. C., 47 Fed., 225.

they may obtain the aid of equity by injunction to prevent defendants from encroaching upon their mines.<sup>23</sup>

§ 736. **Rights of surface owner.** A surface owner of lands is also entitled to an injunction to prevent the owner of minerals beneath the surface from obtaining them in such manner as to destroy or seriously injure the surface.<sup>24</sup> But when the grantor of real property reserves to himself all mines and minerals under the land, with the right to dig for and take them away, covenanting to make compensation to the surface owner, his grantee, for any damage which may be occasioned thereby, the surface owner will not be allowed to enjoin his grantor from taking minerals from under the land so conveyed.<sup>25</sup>

§ 737. **Reducing pillars in mine; mandatory injunction.** The lessee of a mine who has worked it out may be enjoined by the lessor from proceeding to reduce the pillars, which had been left to support the roof of the mine, in such manner as to endanger the falling in of the roof and the flowing in of water upon the mine.<sup>26</sup> So when plaintiffs and defendants own and operate iron mines adjoining each other, defendants may be restrained from removing the pillars, walls and other supports of their mine to such an extent as to render the surface liable to fall in, to the irreparable injury of plaintiff's mine.<sup>27</sup> And where the lessee of a mine had worked into complainant's premises and extracted a large quantity of ore therefrom, a mandatory injunction was granted requiring defendant to permit complainant to inspect the mine for the purpose of determining the extent of the injury.<sup>28</sup>

<sup>23</sup> *Chapman v. Toy Long*, 4 Sawy., 28.

<sup>24</sup> *Hext v. Gill*, L. R. 7 Ch., 699.

<sup>25</sup> *Aspden v. Seddon*, L. R. 10 Ch., 394.

<sup>26</sup> *Thomas Iron Co. v. Allentown Mining Co.*, 28 N. J. Eq. (1 Stew.), 77.

<sup>27</sup> *Lord's Executors v. Carbon I. M. Co.*, 38 N. J. Eq., 452.

<sup>28</sup> *Thomas Iron Co. v. Allentown*



§ 738. **Diversion of water from tunnel.** Where plaintiffs are entitled to a stream of water running through their tunnel which is used for mining purposes, and defendants divert the water from plaintiff's tunnel by running their own tunnel underneath it, they may be enjoined if in so conducting their tunnel they are not digging in their own lands and when the water is not shown to come from their own lands.<sup>29</sup>

Mining Co., 28 N. J. Eq. (1 Stew.),      <sup>29</sup> Cole Co. v. Virginia Co., 1  
77.      Sawy., 470.

## CHAPTER XIII.

### OF INJUNCTIONS AGAINST NUISANCE.

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#### I. GROUNDS OF THE JURISDICTION.

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§ 739. **Foundation of the relief; distinction between trespass and nuisance.** The foundation for the interference of equity in restraint of nuisances rests in the necessity of preventing irreparable mischief and multiplicity of suits. The principles governing courts of equity in the exercise of this jurisdiction are closely allied to those which control their action in restraining trespasses. The distinction between trespass and nuisance consists in the former being a direct infringement of one's rights of property, while in the latter the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it. In the one case the injury is immediate; in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected.<sup>1</sup> And the injury must be such as is not susceptible of adequate pecuniary compensation in damages, or one the continuance of which would cause a constantly resurring grievance.<sup>2</sup>

§ 740. **Right should be established at law; relaxation of rule; injury should be irreparable; relative convenience and inconvenience.** The concurrent jurisdiction of courts of equity, by the writ of injunction, with courts of law in cases of private nuisance is ancient and well established.<sup>3</sup> To warrant the interference, a strong case of imperative necessity must appear, and the nuisance must be in derogation of rights long previously enjoyed.<sup>4</sup> As a general rule it is necessary that the person seeking the aid of equity to restrain a private nuisance should have first established his right at law, and where the right is doubtful and has not

<sup>1</sup> Reynolds v. Clarke, 2 Ld. Paper Co. v. Ford, 6 Del. Ch., 52, Raym., 1399; Weston v. Woodcock, 5 M. & W., 587.

<sup>3</sup> Gardner v. Newburgh, 2 Johns.

<sup>2</sup> New York v. Mapes, 6 Johns. Ch., 162.

Ch., 46; Mohawk & H. R. Co. v. Artcher, 6 Paige, 83; Dana v. Valentine, 5 Met., 8; Jessup v. Moore

<sup>4</sup> Van Bergen v. Van Bergen, 3 Johns. Ch., 282; Porter v. Witham, 17 Maine, 292.

been established, the relief will be withheld.<sup>5</sup> Thus, where the complainant has failed to obtain judgment against defendants in an action at law for the nuisance, and legal proceedings are still pending, the injunction will be denied.<sup>6</sup> And where defendant's right to erect the structure complained of as a nuisance is in dispute, and is not clearly established at law, the court will not interfere.<sup>7</sup> And especially will relief be denied where, in an action for damages resulting from the alleged nuisance, there has been a verdict and judgment for the defendant.<sup>8</sup> And where it is sought to enjoin the obstruction of an easement consisting of a right

<sup>5</sup> *Mayor v. Curtiss*, Clarke Ch., 336; *Rhea v. Forsyth*, 37 Pa. St., 503; *Mammoth Co.'s Appeal*, 54 Pa. St., 183; *City of New Castle v. Raney*, 130 Pa. St., 546, 18 Atl., 1066, 6 L. R. A., 737; *Mowday v. Moore*, 133 Pa. St., 598, 19 Atl., 626; *Wood v. McGrath*, 150 Pa. St., 451, 24 Atl., 682, 16 L. R. A., 715; *Arnold v. Klepper*, 24 Mo., 273; *Porter v. Witham*, 17 Me., 392; *Tracy v. Le Blanc*, 89 Me., 304, 36 Atl., 399; *Sterling v. Littlefield*, 97 Me., 479, 54 Atl., 1108; *Kennerty v. Etiwan Phosphate Co.*, 17 S. C., 412; *Van Bergen v. Van Bergen*, 3 Johns. Ch., 282; *Lownsdale v. Gray's H. B. Co.*, 117 Fed., 983; *McCord v. Iker*, 12 Ohio, 387. In the latter case, Reed, J., observes: "The ground upon which the interference of a court of equity is invoked, is that the mischief to complainant's property is irreparable, and that actions at law furnish no adequate relief. Whilst this is an admitted ground of equity jurisdiction, courts of chancery will carefully abstain from interference where the injury

will support an action at law, unless the party seeking such aid brings himself within the clearest principle of equitable relief. But if it be necessary to prevent a permanent injury to property, or its entire ruin, from the erection and continuance of a nuisance, and the law can not prevent the evil, equity will interfere, although the property itself may be of small value. But, in cases of this sort, equity will not interfere until the right and the facts have been established beyond doubt, at law." And it has been held that the requirement that the right, when in doubt, must be first established at law, is jurisdictional and that the court may therefore raise the objection of its own motion where it is not raised by the pleadings or asserted in the argument. *Mirkil v. Morgan*, 134 Pa. St., 144, 19 Atl., 628.

<sup>6</sup> *Durant v. Williamson*, 3 Halst. Ch., 547.

<sup>7</sup> *Irwin v. Dixon*, 9 How., 10.

<sup>8</sup> *Bierer v. Hurst*, 162 Pa. St., 1, 29 Atl., 98. And see, *post*, § 760.

of way and it appears that the land over which the easement is claimed has been sold for taxes and a tax deed issued, which, if valid, would result in an extinguishment of the easement, relief will be denied until the plaintiff first establishes his legal right as against the validity of the tax deed.<sup>9</sup> And while a trespass affords no foundation for an injunction where it is only contingent and temporary, yet if it continues so long as to become a nuisance, equity may properly enjoin.<sup>10</sup> To warrant the exercise of the jurisdiction in restraint of nuisance, the same irreparable injury must be shown as in the case of trespass, and where this does not appear the person will be left to his remedy at law.<sup>11</sup> Nor will equity interfere where the injury is of a trifling or temporary character.<sup>12</sup> And when the alleged nuisance consists in the sale of an adulterated article, although the act itself may be illegal, it will not be enjoined as a nuisance when it is not shown to be dangerous to life or health.<sup>13</sup> And in granting injunctions against nuisances, as in other cases of relief by injunction, the court may properly be guided by the consideration of the relative convenience and inconvenience of the parties; and if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared with the injury to the defendant, the relief may be denied and the plaintiff left to the pursuit of his remedy at law.<sup>14</sup> As above indicated, the rule requiring the right to be first established at law, as a condition to the granting of equitable relief, is confined to cases where the right is doubtful or is actually in dispute,

<sup>9</sup> *Oswald v. Wolf*, 129 Ill., 200, 21 N. E., 839.

<sup>10</sup> *Coulson v. White*, 3 Atk., 21.

<sup>11</sup> *Fort v. Groves*, 29 Md., 188. See also *Hawley v. Beardsley*, 47 Conn., 571.

<sup>12</sup> *McCord v. Iker*, 12 Ohio, 387; *Attorney-General v. Sheffield Gas*

*C. Co.*, 3 DeGex, M. & G., 304; *Swaine v. Great N. R. Co.*, 33 L. J. Ch., 399.

<sup>13</sup> *Health Department v. Purdon*, 99 N. Y., 237, 1 N. E., 687.

<sup>14</sup> *Clifton Iron Co. v. Dye*, 87 Ala., 468, 6 So., 192.



and where it is not denied, or, if denied, is nevertheless free from substantial doubt, and the facts establishing the nuisance, and the existence of the nuisance itself are clear, the relief will be granted in the first instance without requiring the right to be established in an action at law.<sup>15</sup> And where the injury complained of is a constantly recurring one as distinguished from one which is permanent, it is no defense that the plaintiff has recovered a judgment at law for damages arising from the nuisance where such judgment is for past damages only and affords no redress for those which arise in the future.<sup>16</sup>

§ 741. **When right sufficiently established at law; threatened nuisance.** He who seeks an injunction against a nuisance is not regarded as having sufficiently established his rights at law by obtaining a judgment, if the action in which the judgment was recovered is still pending upon a writ of review.<sup>17</sup> Nor will equity interfere to restrain a nuisance unless it has undivided jurisdiction over the whole litigation, and where some of the questions in dispute are pending in actions at law, an injunction will not be allowed.<sup>18</sup> But where plaintiff has obtained a judgment at law against defendants for a nuisance affecting his real property, and substantial damages have been awarded him, it is almost a matter of course for equity then to enjoin the continuance of the nuisance.<sup>19</sup> And especially will the relief be granted in such case where the nuisance is a continuing one and the

<sup>15</sup> *Wahle v. Reinbach*, 76 Ill., 322; 698, as to the relaxation of the rule in cases of injunctions against trespass.

<sup>16</sup> *City of Kewanee v. Otley*, 204 Ill., 402, 68 N. E., 388.

<sup>17</sup> *Eastman v. Amoskeag Manufacturing Co.*, 47 N. H., 71.

<sup>18</sup> *Eastman v. Amoskeag Manufacturing Co.*, 47 N. H., 71.

<sup>19</sup> *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Ch., 66.

<sup>15</sup> *Wahle v. Reinbach*, 76 Ill., 322; *Village of Dwight v. Hayes*, 150 Ill., 273, 37 N. E., 218, 41 Am. St. Rep., 367; *City of Kewanee v. Otley*, 204 Ill., 402, 68 N. E., 388; *White v. Forbes*, Walk. (Mich.), 112; *Hundley v. Harrison*, 123 Ala., 292, 26 So., 294; *Sprague v. Rhodes*, 4 R. I., 301; *Pennsylvania R. Co. v. New York & L. B. R. Co.*, 8 C. E. Green, 157. See, *ante*, §

damages recovered at law are nominal and therefore inadequate to prevent a repetition of the wrong.<sup>20</sup> And when there has been an action at law and a reference to arbitration and an award in favor of plaintiff's right, he will be regarded as having sufficiently established his right at law to warrant an injunction against the nuisance.<sup>21</sup> So if plaintiff's right is clear and the injury is manifest and of a constantly recurring nature, the relief may be granted without requiring the fact of injury to be determined by an action at law.<sup>22</sup> And where the acts which it sought to restrain will clearly result in a nuisance and are not denied or disavowed by the defendant, and the danger is threatened and impending, preventive relief by injunction will be granted although the nuisance does not yet exist in fact.<sup>23</sup>

§ 742. **Injunction denied when nuisance uncertain; illustrations.** When the injury complained of is not, *per se*, a nuisance, but may or may not become so, according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere.<sup>24</sup>

<sup>20</sup> *Paddock v. Stone*, 102 Mo., 226, 14 S. W., 746, 10 L. R. A., 254.

<sup>21</sup> *Imperial Co. v. Broadbent*, 7 H. L., 600.

<sup>22</sup> *Learned v. Hunt*, 63 Miss., 373.

<sup>23</sup> *Pierce v. Gibson County*, 107 Tenn., 224, 64 S. W., 33, 55 L. R. A., 477, 89 Am. St. Rep., 946.

<sup>24</sup> *Kirkman v. Handy*, 11 Humph., 406; *Laughlin v. President*, 6 Ind., 223; *Keiser v. Lovett*, 85 Ind., 240; *Bowen v. Mauzy*, 117 Ind., 258, 19 N. E., 526; *Dunning v. Aurora*, 40 Ill., 481; *Lake View v. Letz*, 44 Ill., 81; *Thornton v. Roll*, 118 Ill., 350, 8 N. E., 145; *Bell v. Riggs*, 38 La. An., 555; *Rouse v. Martin*, 75 Ala., 510; *Rounsaville v. Kohlheim*, 68 Ga., 668; *Gwin v. Mel-*

*moth*, Freem. Ch., 505; *McCutchen v. Blanton*, 59 Miss., 116; *Thebaut v. Canova*, 11 Fla., 143; *Shivery v. Streeper*, 24 Fla., 103, 3 So., 865; *Rhodes v. Dunbar*, 57 Pa. St., 274; *Simpson v. Justice*, 8 Ired. Eq., 115; *Dorsey v. Allen*, 85 N. C. 358; *Maysville & Mt. S. T. R. Co. v. Ratliff*, 85 Ky., 244, 3 S. W., 148; *Pfingst v. Senn*, 94 Ky., 556, 23 S. W., 358; *Duncan v. Hayes*, 7 C. E. Green, 25; *Hemsley v. Bew*, 53 N. J. Eq., 241, 31 Atl., 210; *Earl of Ripon v. Hobart*, 3 Myl. & K., 169; *S. C., Coop. t. Brougham*, 333; *Mohawk v. Utica*, 6 Paige, 554; *Morgan v. City of Binghamton*, 102 N. Y., 500, 7 N. E., 424; *Fletcher v. Bealey*, 28 Ch. D., 683;

Chambers *v.* Cramer, 49 West Va., 395, 38 S. E., 691, 54 L. R. A., 545. Mohawk *v.* Utica, 6 Paige, 554, was a bill for an injunction to restrain defendants from the erection of a railroad bridge over the Mohawk river below complainant's bridge, one ground upon which relief was asked being that the proposed erection would endanger the safety of complainant's bridge by damming up the ice. Walworth, Chancellor, says: "The principles upon which this court should proceed in granting or refusing relief by injunction in cases of this kind, are correctly laid down by Lord Brougham in the recent case of the Earl of Ripon *v.* Hobart (Cooper's Rep. Temp. Brougham, 333). If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, where the complainant's right is not doubtful, without waiting for the result of a trial. But where the thing sought to be restrained is not in itself noxious, but only something which may according to circumstances prove to be so, the court will refuse to interfere until the matter has been tried at law by an action; though in particular cases the court may direct an issue, for its own satisfaction, where an action could not be brought in such a form as to meet the question." And in the Earl of Ripon *v.* Hobart, 3 Myl. & K., 169, to which reference is here made by Chancellor Walworth, Lord Brougham observes: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mis-

chief without waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But, where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, the court will refuse to interfere, until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property, which are *prima facie* harmless or even praiseworthy, is equally manifest. And it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all, is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant.

Thus, the erection of a wharf,<sup>25</sup> a railroad bridge,<sup>26</sup> a planing mill,<sup>27</sup> a stable,<sup>28</sup> a cotton gin,<sup>29</sup> a blacksmith shop,<sup>30</sup> a beer garden with bowling alleys and dance hall,<sup>31</sup> a toll-gate,<sup>32</sup> a livery stable,<sup>33</sup> or a turpentine distillery,<sup>34</sup> will not be enjoined when the injury is only a possible and contingent one. So, too, the relief will be withheld where the benefit to the public to be derived from the existence of the thing complained of outweighs the private inconvenience, since the injury to one family or person will not be allowed to counter-balance the public benefit.<sup>35</sup> And if, in addition to the danger being remote, the right is also doubtful, the injunction will not be granted.<sup>36</sup> So the relief will not be allowed in the absence of clear and conclusive proof that the

All that has been said in the cases where this unwillingness has appeared, may be referred to in support of the proposition which I have stated; as in the *Attorney-General v. Nichol*, 16 Ves., 338; *Attorney-General v. Cleaver*, 18 Ves., 211; and an anonymous case before Lord Thurlow, in 1 Ves. Jr., 140, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the case of what we have been regarding as eventual or contingent nuisance."

<sup>25</sup> *Laughlin v. President*, 6 Ind., 223.

<sup>26</sup> *Mohawk Bridge Co. v. Utica Co.*, 6 Paige, 554.

<sup>27</sup> *Rhodes v. Dunbar*, 57 Pa. St., 274.

<sup>28</sup> *Rounsaville v. Kohlheim*, 68 Ga., 668; *Shivery v. Streeper*, 24 Fla., 103, 3 So., 865.

<sup>29</sup> *Rouse v. Martin*, 75 Ala., 510.

<sup>30</sup> *Bowen v. Mauzy*, 117 Ind., 258, 19 N. E., 526; *Chambers v. Cramer*, 49 West Va., 395, 38 S. E., 691, 54 L. R. A., 545.

<sup>31</sup> *Pfingst v. Senn*, 94 Ky., 556, 23 S. W., 358.

<sup>32</sup> *Maysville & Mt. S. T. R. Co. v. Ratliff* 85 Ky., 244.

<sup>33</sup> *Kirkman v. Handy*, 11 Humph., 406.

<sup>34</sup> *Simpson v. Justice*, 8 Ired. Eq., 115.

<sup>35</sup> *Attorney-General v. Perkins*, 2 Dev. Eq., 38; *Same v. Lea's Heirs*, 3 Ired. Eq., 302; *Wilder v. Strickland*, 2 Jones Eq., 386; *Daughtry v. Warren*, 85 N. C., 136; *Hewett v. Western Union T. Co.*, 4 Mackey, 424. See also *Dorsey v. Allen*, 85 N. C., 358. And an injunction has been refused which was sought to restrain the lighting of the streets of a city with naphtha. *Anderson v. Mayor*, 69 Ga., 472.

<sup>36</sup> *Mayor v. Curtiss, Clarke Ch.*, 336.

injury is permanent and irreparable and where the acts complained of are only temporary.<sup>37</sup> It is also held that complainant must show that the act from which he seeks relief is illegal, before equity will interfere.<sup>38</sup>

§ 743. **The same.** Where an injunction is asked to restrain the construction of works of such a nature that it is impossible for the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused in the first instance.<sup>39</sup> Nor in such a case will the motion for an interlocutory injunction be allowed to stand over until the work is so far executed that its character may be determined.<sup>40</sup> It is proper, however, under such circumstances to dismiss the bill without prejudice to any further application which plaintiffs may think themselves entitled to make.<sup>41</sup>

§ 744. **Injunction refused when facts uncertain; when bill dismissed without prejudice.** In cases of conflicting evidence as to the fact of a nuisance it is proper to refuse an injunction *in limine*, until the question of nuisance can be finally determined by a verdict. For example, when it is sought to enjoin a mill owner from permitting the ebb and flow of water below his mill caused by the stopping and opening of his gates, the bill alleging that malaria is thereby caused and sickness in the family of complainant, and averring that the health of the neighborhood has become so impaired that visitors no longer come to certain mineral springs upon complainant's premises, if the facts are conflicting and uncertain upon the affidavits introduced, it is proper to refuse an injunction until after verdict, especially when the grievance has continued for a number of years.<sup>42</sup> And a defend-

<sup>37</sup> Nelson v. Mulligan, 151 Ill., 462, 38 N. E., 239. Rouse v. Martin, 75 Ala., 510. See also Adams v. Michael, 38 Md., 123.

<sup>38</sup> Bruce v. President, 19 Barb., 371.

<sup>40</sup> Haines v. Taylor, 2 Ph., 209.

<sup>41</sup> Adams v. Michael, 38 Md., 123.

<sup>39</sup> Haines v. Taylor, 2 Ph., 209;

<sup>42</sup> Nelms v. Clark, 44 Ga., 617.



ant will not be enjoined from sowing upon his own land, adjoining that of plaintiff, a peculiar species of grass seed alleged to be injurious and likely to render plaintiff's land useless, when the testimony is conflicting as to the nature and effect of such seed, leaving the court in doubt as to the fact of nuisance.<sup>43</sup> So the relief will be refused when sought by a city to restrain the enlargement of a building alleged to be in violation of a building ordinance of the city, when such construction is not a nuisance in fact and will not occasion irreparable injury.<sup>44</sup> And while the bill should be dismissed if the evidence is conflicting and the nuisance uncertain, yet if the acts complained of may subsequently develop into a nuisance, the dismissal should be without prejudice.<sup>45</sup>

§ 745. **Remedy at law a bar to injunction.** Notwithstanding the well established jurisdiction of equity to enjoin the erection of nuisances, and the fact that in some cases the relief is even extended to the abatement of the nuisance, the existence of a legal remedy will be held sufficient ground for withholding an injunction. Thus, when a full and complete legal remedy is provided by a statute authorizing courts of law to give judgment of abatement in actions for damages incurred by private nuisances, a court of equity may refuse to entertain an action to enjoin and abate such a nuisance.<sup>46</sup> So when a summary remedy is provided by statute for the abatement by the municipal authorities of cities of all nuisances, public and private, a court of equity may properly refuse to interfere by injunction, when no obstacle is shown in the way of proceedings at law.<sup>47</sup> And a drinking saloon doing business

<sup>43</sup> *McCutchen v. Blanton*, 59 158 Ill., 21, 42 N. E., 77. Miss., 116.

<sup>46</sup> *Remington v. Foster*, 42 Wis.

<sup>44</sup> *Mayor v. Smyth*, 64 N. H., 380, 608. 10 Atl., 700.

<sup>47</sup> *Powell v. Foster*, 50 Ga., 790.

<sup>45</sup> *Robb v. Village of La Grange*,

in a city in violation of law, although a nuisance, will not be enjoined when ample remedy is provided by law for its abatement.<sup>48</sup> And it may be said generally, that the aid of an injunction will not be extended for the prevention of a nuisance when it does not satisfactorily appear that the person aggrieved is without adequate remedy at law.<sup>49</sup> So equity will not enjoin an encroachment by defendant upon premises claimed by plaintiff, when the title to the premises upon which the alleged nuisance is to be erected is in dispute and is claimed by both parties, and when adequate relief may be afforded by an action of ejectment.<sup>50</sup> It is, however, to be observed that the fact that the commission of the threatened act, which it is sought to enjoin as a nuisance, may be punished criminally as such will not prevent the exercise of the restraining power of equity.<sup>51</sup>

§ 746. **Difficulty of abating nuisance.** A court of equity will not be deterred from the exercise of its jurisdiction in restraint of nuisance because of the difficulty or expense attending the removal by defendants of the nuisance in question. It is proper, however, where the difficulties of such removal are very great, on granting the injunction to suspend its operation for a given time to enable defendants to make the necessary arrangements for removing the nuisance.<sup>52</sup> Or the court may refuse the injunction altogether and enter a decree simply finding and declaring the plaintiff's rights, with leave to the plain-

<sup>48</sup> *State v. Crawford*, 28 Kan., 726.

<sup>49</sup> *Parker v. Winnipiseogee L. Co. & W. Co.*, 2 Black, 545.

<sup>50</sup> *Morris C. & B. Co. v. Fagin*, 7 C. E. Green, 430.

<sup>51</sup> *People v. St. Louis*, 5 Gilm., 351; *Attorney-General v. Hunter*, 1 Dev. Eq., 12; *Gilbert v. Morris C. & B. Co.*, 4 Halst. Ch., 495; *Cranford v. Tyrrell*, 128 N. Y., 341, 28

N. E., 514; *People's Gas Co. v. Tyner*, 131 Ind., 277, 31 N. E., 59, 16 L. R. A., 443, 31 Am. St. Rep., 433; *Columbian Athletic Club v. State*, 143 Ind., 98, 40 N. E., 914, 28 L. R. A., 728, 52 Am. St. Rep., 407.

<sup>52</sup> *Attorney-General v. Colony Hatch Lunatic Asylum*, L. R. 4 Ch., 146.

tiff to apply for an injunction if the nuisance shall not be abated by the defendant within a reasonable time named by the court.<sup>53</sup>

§ 747. **Prohibition of business by municipal authorities.** While equity will not interfere by injunction with the legitimate exercise of the powers conferred by law upon municipal authorities for the abatement of nuisances, it may interpose its aid to prevent such authorities from prohibiting a citizen from conducting a legitimate business which is not necessarily a nuisance, and which may be carried on in a city without injury or danger to the public health. And where, without notice to complainant who is engaged in the business of curing hides in a city, the municipal board of health absolutely prohibit him from carrying on his business, an injunction is proper to restrain the board from enforcing such prohibition while the business is not conducted as a nuisance.<sup>54</sup> Where, however, a board of municipal officers, such as the board of health of a city, are fully empowered by law to prohibit the exercise within the city of any offensive or dangerous trade or employment, or any nuisance, and the board, duly acting within the scope of their authority, have prohibited the exercise of an offensive trade, the city may then maintain a bill to enjoin the continuance of such trade. And upon such a bill the action of the board of health in determining that the trade in question is a nuisance may be taken as quasi-judicial, and not open to review in a court of equity.<sup>55</sup>

§ 748. **Erection of wooden buildings; conflict of authority.** Although the jurisdiction of equity to prevent by injunction the erection or maintenance of nuisances is, as we have already seen, undoubted, the courts are neverthe-

<sup>53</sup> *Vestry of Islington v. Hornsey Council*, (1900) 1 Ch., 695.

<sup>55</sup> *Taunton v. Taylor*, 116 Mass., 254.

<sup>54</sup> *Weil v. Ricord*, 9 C. E. Green, 169.

less inclined to limit its exercise to cases of nuisance *per se*, and not to extend the relief to enjoining structures which are merely prohibited by municipal regulation.<sup>56</sup> And where a village ordinance prohibits the erection of wooden buildings within certain specified limits, imposing a penalty for violation of the ordinance, and also provides that the president and trustees of the village shall cause any person violating the ordinance to be enjoined by a court of competent jurisdiction, an injunction will not be granted to prevent the erection of wooden buildings in violation of the ordinance.<sup>57</sup> And the provision in the ordinance directing the officers to proceed by injunction in such case in no manner extends or enlarges the jurisdiction of the court, and the municipal authorities will be left to seek their remedy at law for a violation of the ordinance.<sup>58</sup> The reasoning of the authorities which hold thus is that since a wooden building is not in itself a nuisance, the mere fact that the erection of such a building is prohibited by ordinance does not render it one; and that the remedy, if any, of the public authorities for a violation of the ordinance is by the enforcement of the penalties provided by it. A different conclusion, however, has been reached by other courts and it has accordingly been held that where the erection or removal of wooden buildings within certain limits is prohibited by municipal ordinance, the relocation of such a building contrary to the provisions of the ordinance and so near plaintiff's property as to increase his fire risk may be enjoined as a nuisance by a property owner who is thus specially damaged thereby.<sup>59</sup> And where it is provided by

<sup>56</sup> President and Trustees *v.* See also Mayor *v.* Smyth, 64 N. H., Moore, 34 Wis., 450; Mayor *v.* 380, 10 Atl., 700.

Thorne, 7 Paige, 261; Village of <sup>58</sup> President and Trustees *v.* Moore, 34 Wis., 450.

<sup>57</sup> President and Trustees *v.* <sup>59</sup> Kaufman *v.* Stein, 138 Ind., Moore, 34 Wis., 450; Village of St. 49, 37 N. E., 333, 46 Am. St. Rep., Johns *v.* McFarlan, 33 Mich., 72. 368. To the same effect see *dicta*

ordinance that no wooden building shall be moved within certain limits without the consent of a majority of the front foot ownership in the block, the removal of such a building without the required frontage consent will be enjoined at the suit of an adjoining or neighboring property owner who suffers special damage.<sup>60</sup> But when a body of commissioners, appointed by the executive authority of the state, and having no authority to exercise the power of local legislation, attempt by an ordinance to abate as a nuisance that which is not such at common law, their action may be enjoined.<sup>61</sup>

§ 749. **Abatement and damages in statutory action.** When it is provided by statute that in an action to recover damages for a nuisance the nuisance may be enjoined or abated as well as damages be recovered, the abatement and injunction do not follow the recovery of damages as a matter of course, but their allowance rests in the sound judicial discretion of the court. And where, in an action under such statute to recover damages for a nuisance resulting to plaintiff's land from the overflowing of defendant's mill-dam, the issues are submitted to a jury, to warrant an injunction there should be a specific finding as to how much of defendant's dam should be abated and enjoined in order to relieve plaintiff's land from unlawful flowage.<sup>62</sup>

§ 750. **Construction of ditch.** In conformity with the general doctrine that equity will not enjoin where there is an adequate remedy at law, the owners of real estate are not entitled to an injunction against the construction of a ditch by an adjacent owner upon the ground that it will destroy a ditch upon plaintiff's premises, when a method is provided by statute for the assessment of benefits and damages in such cases.<sup>63</sup>

in *First National Bank v. Sarlls*,  
129 Ind., 201, 28 N. E., 434, 13 L. R.  
A., 481, 28 Am. St. Rep., 185.

<sup>61</sup> *Schuster v. Metropolitan Board  
of Health*, 49 Barb., 450.

<sup>62</sup> *Finch v. Green*, 16 Minn., 355.

<sup>60</sup> *Griswold v. Brega*, 160 Ill., 490,  
43 N. E., 864, 52 Am. St. Rep., 350.

<sup>63</sup> *Ploughe v. Boyer*, 38 Ind., 113.



§ 751. **Throwing surface water upon adjacent lands.** While the owner of real estate may properly use and cultivate it in accordance with good husbandry, even if in so doing he interferes with the natural flow of surface water passing over his own land, and increases or diminishes the amount which would otherwise reach the land of an adjoining proprietor, yet a land owner has no right by the construction of ditches and embankments, or other artificial structures of a like character, to collect the surface waters from his own lands or those of other persons, and to precipitate them upon the lands of an adjacent owner, to the great injury of the latter; and the remedy by injunction is well established for such grievance.<sup>64</sup> And the fact that plaintiff, in such case, does not upon the hearing prove the injury to the full extent charged in his bill will not prevent him from obtaining relief.<sup>65</sup> So relief may be granted against the diversion of waters from their natural channels by artificial means at the suit of the public authorities, such as commissioners of highways or drainage commissioners having jurisdiction over the subject-matter affected by the nuisance.<sup>66</sup> And while a property owner is compelled to submit to the burden resulting from the ordinary and natural flow of surface waters upon and over his land through natural channels and watercourses, yet where the municipal authorities are proceeding by artificial means to divert unusual quantities of surface water from surrounding lands and to discharge it by such artificial means upon the lands of complainant in a greatly increased volume and in quantities greatly in excess of the natural flow, to the destruction or serious injury of such land, their action may

<sup>64</sup> Hicks v. Silliman, 93 Ill., 255;  
Graham v. Keene, 143 Ill., 425, 32  
N. E., 180; Peters v. Lewis, 28  
Wash., 366, 68 Pac., 869.

<sup>65</sup> Hicks v. Silliman, 93 Ill., 255.

<sup>66</sup> Dayton v. Drainage Commis-  
sioners, 128 Ill., 271, 21 N. E., 198;  
Davis v. Commissioners of High-  
ways, 143 Ill., 9, 33 N. E., 58.

be restrained by injunction.<sup>67</sup> And the fact that plaintiff's land is subjected to the burden of the drainage of other lands will not justify such additional imposition.<sup>68</sup> So a railway company may be enjoined from maintaining a ditch along its road-bed in such manner as to turn the water from its natural course, causing it to overflow plaintiff's land to his serious injury.<sup>69</sup> And where a railway company has removed an open trestle forming part of its right of way over a stream and in its place has built a solid stone culvert containing an opening so small as to be entirely inadequate to permit the passage of the water at times of heavy rains, thus seriously injuring plaintiff's lands by the overflow, relief by injunction will be allowed.<sup>70</sup> And when the nuisance consists in the obstruction of the natural flow of a stream, whereby plaintiff's lands are inundated, an injunction may be allowed although it is not shown that defendant is insolvent.<sup>71</sup> And where two adjacent tracts of land are so situated that the upper tract has a natural easement or servitude in the lower for the discharge of all surface water, the owner of the servient estate may be restrained from the erection of an embankment upon his land whereby the water is thrown back upon the upper tract and its natural flow obstructed.<sup>72</sup> And where defendant brings water upon his land by artificial means, a portion of which percolates through the soil to plaintiff's land, rendering it useless, relief by injunction

<sup>67</sup> *Soule v. City of Passaic*, 47 N. J. Eq., 28, 20 Atl., 346; *Miller v. Mayor of Morristown*, 47 N. J. Eq., 62, 20 Atl., 61; *Whipple v. Village of Fair Haven*, 63 Vt., 221, 21 Atl., 533; *Patoka Township v. Hopkins*, 131 Ind., 142, 38 N. E., 96, 31 Am. St. Rep., 417; *Young v. Commissioners of Highways*, 134 Ill., 569, 25 N. E., 689; *Jewett v. Sweet*, 178 Ill., 96, 52 N. E., 962.

<sup>68</sup> *Soule v. City of Passaic*, 47 N. J. Eq., 28, 20 Atl., 346.

<sup>69</sup> *G. H. & S. A. R. Co. v. Tait*, 63 Tex., 223.

<sup>70</sup> *Lake Erie & W. R. Co. v. Young*, 135 Ind., 426, 35 N. E., 177, 41 Am. St. Rep., 430.

<sup>71</sup> *Moore v. Chicago, B. & Q. R. Co.*, 75 Iowa, 263, 39 N. W., 390.

<sup>72</sup> *Nininger v. Norwood*, 72 Ala., 277. But see *Crabtree v. Baker*, 75 Ala., 91.

may be allowed.<sup>73</sup> But the erection by defendant of an embankment upon his own land as a protection against the overflow of a non-navigable river dividing his land from that of plaintiff, which may result in throwing such overflow upon plaintiff's land, will not be restrained upon general averments of irreparable injury, and when sufficient remedy exists by an action at law for damages.<sup>74</sup> And to entitle the plaintiff to relief against the diversion of waters, a strong case of irreparable injury must be presented, and the relief will be denied where the evidence as to the injury is conflicting and it is not certain that any damage will result to the plaintiff from the alleged nuisance complained of.<sup>75</sup>

§ 752. **Lawful business not enjoined; criminal liability no bar to relief.** Where the injury complained of is such only as is incident to a lawful business conducted in the ordinary way, equity will not interfere. Thus, an injunction has been refused against the injury and annoyance caused by the smoke from semi-bituminous coal used in the production of iron, it being used in the usual course of such business, and it appearing that greater injury would result from granting than from withholding the relief, and where such injury as might result could be adequately compensated in damages.<sup>76</sup> And where defendant disclaims the intention of continuing the nuisance, and is using due diligence for its removal, the injunction will be refused.<sup>77</sup> But the fact that the act threatened might be punished criminally as a nuisance will not prevent the exercise of the restraining power of equity.<sup>78</sup> And the continued displaying of banners in front of plaintiff's place of business, with inscrip-

<sup>73</sup> *Parker v. Larsen*, 86 Cal., 236;  
24 Pac., 989, 21 Am. St. Rep., 30.

<sup>74</sup> *Blaine v. Brady*, 64 Md., 373,  
1 Atl., 609.

<sup>75</sup> *Hotz v. Hoyt*, 135 Ill., 388, 25  
N. E., 753.

<sup>76</sup> *Richard's Appeal*, 57 Pa. St.,  
105.

<sup>77</sup> *King v. Morris*, 3 C. E. Green,  
397.

<sup>78</sup> *People v. St. Louis*, 5 Gilm.,

tions warning workmen not to enter his employ, has been enjoined as a nuisance.<sup>79</sup>

§ 753. **Right to lateral support protected.** The right to lateral support is regarded as an incident to the ownership of land, and its infringement has been considered as a nuisance which equity may enjoin. Thus, the removal and excavation of earth upon adjacent premises in such manner as to endanger the stability of complainant's soil and fences, by removing their lateral support, will be enjoined.<sup>80</sup>

§ 754. **Burning wooded lands.** Equity will not interfere by injunction to prevent land owners from burning off wooded lands which are unenclosed, at undue seasons of the year, and in violation of the penal laws of the state, when plaintiff claims no title to, or prescriptive right in the premises, the only right asserted by him being a common of pasture for his cattle, which have been accustomed to range in the woods.<sup>81</sup>

§ 755. **Exclusive right of slaughtering animals.** Where the legislature of a state, in the exercise of its police power, has designated certain places for the slaughtering of animals, prohibiting their slaughter at other places,

351; Attorney-General *v.* Hunter, 1 Dev. Eq., 12; Cranford *v.* Tyrrell, 128 N. Y., 341, 28 N. E., 514; Gilbert *v.* Morris C. & B. Co., 4 Halst. Ch., 495; People's Gas Co. *v.* Tyner, 131 Ind., 277, 31 N. E., 59, 16 L. R. A., 443, 31 Am. St. Rep., 433; Columbian Athletic Club *v.* State, 143 Ind., 98, 40 N. E., 914, 28 L. R. A., 728, 52 Am. St. Rep., 407.

<sup>79</sup> Sherry *v.* Perkins, 147 Mass., 212, 17 N. E., 307.

<sup>80</sup> Trowbridge *v.* True, 52 Conn., 190; Farrand *v.* Marshall, 19 Barb., 380; Same *v.* Same, 21 Barb., 409.

In this case the opinion of the court, although somewhat *obiter*, would seem to imply that the doctrine is to be confined strictly to those cases where the owner of the land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil; since, when the owner of the land has erected buildings upon the edge of his soil, he himself is regarded as in fault.

<sup>81</sup> Harrell *v.* Hannum, 56 Ga., 508.

and has chartered an incorporated company for carrying into effect such legislation, conferring upon the company thus incorporated the exclusive right to maintain a slaughter house within a particular city, the state may, upon a bill filed by its attorney-general, enjoin persons from interfering with the execution of such law, and from doing any of the acts prohibited thereby.<sup>82</sup>

§ 756. **Effect of acquiescence and delay; effect of release; hindrance by plaintiff.** Long continued acquiescence in the erection of works which it is afterwards sought to enjoin as a nuisance may constitute a bar to relief.<sup>83</sup> And it may be asserted as a rule that long delay upon the part of plaintiff who seeks to enjoin a nuisance will afford sufficient reason for refusing him relief in equity.<sup>84</sup> The rule is extended even further, and it is held that one party may so encourage another in the erection of what he afterward complains of as a nuisance, as not only to deprive the aggrieved party of the right to equitable relief,<sup>85</sup> but to give the adverse party a right to invoke the aid of equity to restrain proceedings at law for the recovery of damages resulting from the alleged nuisance.<sup>86</sup> So when plaintiff, in compromise of an action to recover damages from an alleged nuisance, has released defendant from all right of action on account thereof, he is thereby estopped from enjoining the maintenance of the alleged nuisance.<sup>87</sup> And where the defendant has made proper efforts to abate the nuisance complained of but has been thwarted in his attempts by the acts of the plaintiff, relief against the nuisance will be denied.<sup>88</sup>

<sup>82</sup> *State v. Fagan*, 22 La. An., 545.

<sup>83</sup> *Wood v. Sutcliffe*, 2 Sim. N. S., 163.

<sup>84</sup> *Wicks v. Hunt, John.*, 372.

<sup>85</sup> *Huntington & K. L. D. Co. v. P. P. Mfg. Co.*, 40 West Va., 711, 21 S. E., 1037.

<sup>86</sup> *Williams v. Jersey*, 1 Cr. & Ph., 91.

<sup>87</sup> *Kennerty v. Etiwan P. Co.*, 17 S. C., 411.

<sup>88</sup> *Richardson v. City of Eureka.*, 110 Cal., 441, 42 Pac., 965.



§ 757. **Joinder of parties.** Upon the question of the joinder of parties in proceedings to restrain a private nuisance, it is held that where the grievance is common to several different property owners, they may unite in one action for an injunction.<sup>89</sup> And in such case it is not necessary that the grievance complained of shall affect all of the plaintiff's precisely at the same instant and in the same degree, if they are affected in the same general period of time and in a similar way, so that the same relief may be had by all in a single suit.<sup>90</sup> It is to be observed, however, that the joinder in such case is permissive merely, the various property owners being proper but not necessary parties. One owner, therefore, can not sue upon behalf of all others similarly situated and the latter can not be bound by the result of another's separate action.<sup>91</sup> And a court of equity will not upon a bill by one co-tenant enjoin his co-tenants from keeping a saloon upon the common property, when no special injury is shown to be sustained by plaintiff which is not suffered by the public, and when the bill fails to allege any immediate and threatened injury.<sup>92</sup> And where it is sought to enjoin a nuisance to a public highway, a property owner who abuts upon the highway at such a distance from the erection or obstruction complained of as to suffer no injury different in kind from that sustained by the public generally, is not a proper

<sup>89</sup> *Foot v. Bronson*, 4 Lans., 47; 416; *Town of Sullivan v. Phillips*, *Gillespie v. Forrest*, 18 Hun, 110; 110 Ind., 320, 11 N. E., 300; *Hart Snyder v. Cabell*, 29 West Va., 48, *v. Buckner*, 5 C. C. A., 1, 54 Fed., 1 S. E., 241; *Lonsdale v. City of* 925; *Pettibone v. Hamilton*, 40 Woonsocket, 21 R. I., 498, 44 Atl., Wis., 402.

<sup>90</sup> *Rowbotham v. Jones*, 47 N. J. Eq., 337, 20 Atl., 731, 19 L. R. A., 663; *Attorney-General v. Mayor of* 663.

<sup>91</sup> *Linden Land Co. v. M. E. R. & L. Co.*, 107 Wis., 493, 83 N. W., 851.

<sup>92</sup> *Oglesby Coal Co. v. Pasco*, 79 Ill., 164.

See also *Reid v. Gifford*, Hopk. Ch.,

party complainant to maintain a bill to enjoin such nuisance.<sup>93</sup>

§ 758. **When injunction perpetuated; when made mandatory.** At the final hearing upon bill and answer, if it is apparent from the pleadings that defendants are about to do some act charged in the bill, which if permitted would constitute a nuisance injurious to complainants, the preliminary injunction should be made perpetual.<sup>94</sup> So when the nuisance consists in the erection of a building upon ground adjacent to premises occupied by plaintiff, upon and over which he has an easement which has been established at law, he is entitled upon final hearing to a mandatory injunction to remove and abate so much of the building as prevents the enjoyment of his rights.<sup>95</sup>

<sup>93</sup> *City of Chicago v. Union Building Association*, 102 Ill., 379; *Parker v. Catholic Bishop*, 146 Ill., 158, 34 N. E., 473; *Guttery v. Glenn*, 201 Ill. 275, 66 N. E., 305; *McGee's Appeal*, 114 Pa. St., 470, 8 Atl., 237; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St., 264, 62 N. E., 341; *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn., 502; *Gundlach v. Hamm*, 62 Minn., 42, 64 N. W., 50. And see, *ante*, § 594 and, *post*, § 1301.

<sup>94</sup> *Attorney-General v. Steward*, 6 C. E. Green, 340.

<sup>95</sup> *Stanford v. Lyon*, 37 N. J. Eq. 94. See S. C., 7 C. E. Green, 33, where a preliminary injunction was refused because plaintiff had not established his right at law.

## II. PUBLIC NUISANCES.

- § 759. Purpresture defined.  
 760. Piers; wharves; embankments of canal; public lands; mandatory injunction.  
 761. Remedy at law.  
 762. Right of private person to enjoin public nuisance.  
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 769. Violation of private right necessary.  
 770. Navigable creek; pendency of criminal proceedings.  
 771. Adverse user no bar to relief.  
 771a. Wasting of natural gas.

§ 759. **Purpresture defined.** One of the earliest recognized forms of public nuisance with which equity has interfered is that of purpresture. A purpresture was formerly held to be a close or enclosure, or in other words an encroachment whereby one person makes several to himself that which ought to be common to the public.<sup>1</sup> The later acceptance of the term, however, is that of an encroachment upon the rights of the sovereign, either by trespassing on his soil, or upon easements, such as highways, bridges, and public rivers.<sup>2</sup> And a still narrower signification has been given to the term by limiting it to an encroachment upon the soil of the seashore, or other tidal waters belonging to the sovereign, between high and low water mark.<sup>3</sup> The jurisdiction of equity in cases of purpresture, as well as of public nuisances generally, rests in the necessity of preventing irreparable

<sup>1</sup> 2 Coke Inst., 38, 272.

Paige, 554; Attorney-General v.

<sup>2</sup> New Orleans v. United States, Cohoes Company, 6 Paige, 133.

10 Pet., 662; Mohawk v. Utica, 6

<sup>3</sup> Attorney-General v. Chamberlane, 4 Kay & J., 292.

mischief and avoiding vexatious litigation. The equitable remedy is more efficacious than the remedy at law, since it has the effect, not only of abating nuisances already existing, but of restraining those which are threatened or in progress.<sup>4</sup> But a public nuisance, such as will justify relief by injunction, can not arise from an act which is expressly authorized by statute.<sup>5</sup>

§ 760. **Piers; wharves; embankments of canal; public lands; mandatory injunction.** The unauthorized erection of a pier in a public harbor is a purpresture which will be restrained by injunction at the suit of the attorney-general.<sup>6</sup> And such an erection will be regarded as a nuisance *per se*, and will be enjoined without evidence to show that it would, if erected, be a nuisance in fact.<sup>7</sup> So the unauthorized erection of a pier in a lake, the title to the submerged lands being in the state in trust for the public, may be enjoined as a purpresture in an information in equity by the attorney-general, although the obstruction does not in fact amount to a nuisance.<sup>8</sup> So the obstruction of a navigable river, by a wharf owner driving piles into the bed of the river and extending his wharf so as to occupy a space of three feet, out of a width of sixty feet available for navigation may be enjoined.<sup>9</sup> But where it clearly appears that the erection of a pier or wharf in tidal waters, and upon soil

<sup>4</sup> 2 Story's Eq., § 924; Attorney-General v. Johnson, 2 Wils. Ch., 87; Township of Hutchinson v. Filk, 44 Minn., 536, 47 N. W., 255.

<sup>5</sup> Hewett v. Western Union T. Co., 4 Mackey, 424.

<sup>6</sup> People v. Vanderbilt, 28 N. Y. 396, affirming S. C., 38 Barb., 282; Davis v. Mayor, 4 Kern., 526; People v. N. Y. & S. I. F. Co., 68 N. Y., 71, modifying and affirming S. C., 7 Hun, 105.

<sup>7</sup> People v. Vanderbilt, 38 Barb., 282. As to the right to enjoin a

city from obstructing plaintiff's wharf and cutting him off from access to the navigable waters upon which his wharf is situated, see Crocker v. City of New York, 15 Fed., 405.

<sup>8</sup> Revell v. The People, 177 Ill., 468, 52 N. E., 1052, 43 L. R. A., 790, 69 Am. St. Rep., 257; Gordon v. Winston, 181 Ill., 338, 54 N. E., 1095.

<sup>9</sup> Attorney-General v. Terry, L. R. 9 Ch., 423.

thereunder, belonging to the state, would not constitute a public nuisance, and would not prove injurious to the harbor or to the people of the state, an injunction should not be allowed.<sup>10</sup> Where, however, the structure proposed would hinder navigation, it will not avail defendant to urge that the benefit to the public counterbalances the inconvenience.<sup>11</sup> But to warrant an injunction against an alleged purpresture or public nuisance it must clearly appear that it is such in fact: and if it be doubtful whether there is a purpresture the relief will be withheld.<sup>12</sup> It is held that in cases of doubt the question as to the existence of the nuisance should be determined by a jury before granting the injunction.<sup>13</sup> And where that issue has been settled at law by the acquittal of the defendant by a jury in an indictment for the maintenance of a public nuisance, relief will be denied.<sup>14</sup> But any unauthorized appropriation of public property to private uses, amounting to a purpresture or public nuisance, is within the jurisdiction of equity to enjoin. And the cutting through the embankments of a public canal to draw off water for defendant's mills comes within the rule and will be restrained.<sup>15</sup> So a riparian owner upon a navigable river, owning to the line of high water mark, may be enjoined from erecting a wharf or pier in front of his premises and between high and low water mark, at the suit of a municipal corporation which is vested with the exclusive right to construct

<sup>10</sup> *People v. Davidson*, 30 Cal., 379. And see *Engs v. Peckham*, 11 R. I., 210. But see, *contra*, *Revell v. The People*, 177 Ill., 468, 52 N. E., 1052, 43 L. R. A., 790, 69 Am. St. Rep., 257.

<sup>11</sup> *Rex v. Ward*, 4 A. & E., 386.

<sup>12</sup> *Attorney-General v. Delaware & B. R. Co.*, 12 C. E. Green, 1. See also *Harlan & H. Co. v. Paschall*, 5 Del. Ch., 435.

<sup>13</sup> *Attorney-General v. Cohoes*, 6 Paige, 133; *Mohawk v. Utica*, 6 Paige, 554; *Attorney-General v. Cleaver*, 18 Ves., 217.

<sup>14</sup> *Commonwealth v. Croushore*, 145 Pa. St., 157, 22 Atl., 807. And see, *ante*, § 740.

<sup>15</sup> *Attorney-General v. Cohoes*, 6 Paige, 133.



wharves within the corporate limits.<sup>16</sup> And the unauthorized enclosure by private citizens of public lands of the state constitutes such a purpresture as may be enjoined at the suit of the attorney-general. And in such case it is proper to grant a mandatory injunction to compel the removal of the illegal obstruction.<sup>17</sup>

§ 761. **Remedy at law.** Though the jurisdiction of equity in restraint of public nuisances is well established,<sup>18</sup> it will not be exercised where the object sought can be as well attained in the ordinary tribunals,<sup>19</sup> unless upon the application of one who suffers a personal injury aside from the injury to the public, in which case an injunction may be allowed, even though there is a remedy at law by abatement of the nuisance and indictment of the offender.<sup>20</sup> And equity will not entertain a bill filed by the attorney-general to abate a public nuisance where the state has created local boards and has delegated to them ample power to redress the grievances complained of.<sup>21</sup>

§ 762. **Right of private person to enjoin public nuisance.** No principle of the law of injunctions is more clearly established than that private persons, seeking the aid of equity to restrain a public nuisance, must show some special injury peculiar to themselves, aside from and independent of the general injury to the public. And in the absence of such special and peculiar injury sustained by a

<sup>16</sup> *Ravenswood v. Flemings*, 22 Co. v. Prudden, 5 C. E. Green, 530; West Va., 52. Attorney-General v. Brown, 9 C.

<sup>17</sup> *State v. Goodnight*, 70 Tex., E. Green, 89; *Inhabitants of Raritan v. P. R. R. Co.*, 49 N. J. Eq., 682. See also *United States v. Brighton Rancho Co.*, 25 Fed., 465; 11, 24 Atl., 127.

S. C., 26 Fed., 218; *United States v. Cleveland & C. C. Co.*, 33 Fed., 323. <sup>20</sup> *Ewell v. Greenwood*, 26 Iowa, 377. But the injury must be great and the necessity pressing. *Morris & E. R. Co. v. Prudden*, 5 C. E. Green, 530.

<sup>18</sup> *State v. Mayor*, 5 Port., 279; *Water Commissioners v. Hudson*, 2 Beas., 420. <sup>21</sup> *People v. Equity Gas Light Co.*, 141 N. Y., 232. 36 N. E., 194.

<sup>19</sup> *Water Commissioners v. Hudson*, 2 Beas., 420; *Morris & E. R.*

private citizen he will be denied an injunction, leaving the public injury to be redressed upon information or other suitable proceeding by the attorney-general in behalf of the public.<sup>22</sup> Even in cases of unquestioned nuisance, if the

<sup>22</sup> *Bigelow v. Hartford Bridge Co.*, 14 Conn., 565; *O'Brien v. Norwich & W. R. Co.*, 17 Conn., 372; *Frink v. Lawrence*, 20 Conn., 117; *Doolittle v. Supervisors*, 18 N. Y., 160; *Corning v. Lowerre*, 6 Johns. Ch., 439; *Adler v. Met. El. R. Co.*, 138 N. Y., 173, 33 N. E., 935; *Allen v. Board*, 2 Beas., 68; *Illinois Company v. St. Louis*, 2 Dill., 70; *Hinchman v. Paterson H. R. Co.*, 2 C. E. Green, 75; *Van Horne v. Newark P. R. Co.*, 48 N. J. Eq., 332, 21 Atl., 1034; *Perkins v. M. & C. T. Co.*, 48 N. J. Eq., 499, 22 Atl., 180; *Morris & Essex R. Co. v. Newark P. R. Co.*, 51 N. J. Eq., 379, 29 Atl., 184; *Mechling v. Kittinging Bridge Co.*, 1 Grant's Cases, 416; *Beveridge v. Lacey*, 3 Rand., 63; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Minn., 136; *Gundlach v. Hamm*, 62 Minn., 42, 64 N. W., 50; *Walker v. Shepardson*, 2 Wis., 384; *Barnes v. Racine*, 4 Wis., 454; *Williams v. Smith*, 22 Wis., 594; *Hay v. Weber*, 79 Wis., 587, 48 N. W., 859, 24 Am. St. Rep., 737; *Kuehn v. City of Milwaukee*, 83 Wis., 583, 53 N. W., 912, 18 L. R. A., 553; *Ewell v. Greenwood*, 26 Iowa, 377; *Prince v. McCoy*, 40 Iowa, 533; *Green v. Lake*, 54 Miss., 540; *Engs v. Peckham*, 11 R. I., 210; *Bosworth v. Norman*, 14 R. I., 521; *Palmer v. Logansport & R. C. G. R. Co.*, 108 Ind., 137, 8 N. E., 905; *Seager v. Kankakee Co.*, 102 Ill., 669; *City of Chicago v. Union Building Association*, 102 Ill., 379;

*Springer v. Walters*, 139 Ill., 419, 28 N. E., 761; *Pittsburg, F. W. & C. R. Co. v. Cheevers*, 149 Ill., 430, 37 N. E., 49, 24 L. R. A., 156; *Chicago Gen. Ry. Co. v. C., B. & Q. R. Co.*, 181 Ill., 605, 54 N. E., 1026; *Guttery v. Glenn*, 201 Ill., 275, 66 N. E., 305; *Schall v. Nusbaum*, 56 Md., 512; *Coast Line R. Co. v. Cohen*, 50 Ga., 451; *Redway v. Moore*, 3 Idaho, 312, 29 Pac., 104; *Ruffner v. Phelps*, 65 Ark., 410, 46 S. W., 728; *Hill v. Pierson*, 45 Neb., 503, 63 N. W., 835; *Esson v. Wattier*, 25 Ore., 7, 34 Pac., 756; *Rhymer v. Fretz*, 206 Pa. St., 230, 55 Atl., 959; *Cherry v. City of Rock Hill*, 48 S. C., 553, 26 S. E., 798; *Manson v. S. B. R. Co.*, 64 S. C., 120, 41 S. C., 832. And in this respect a railroad company, although a quasi-public corporation performing public services stands upon the same footing as a private individual. *Morris & Essex R. Co. v. Newark P. R. Co.*, 51 N. J. Eq., 379, 29 Atl., 184. And in *Higbee v. Camden & A. R. & T. Co.*, 4 C. E. Green, 276, it is said that a bill by private persons is a proper remedy so far as the injury to complainants is a personal or peculiar injury, and not one shared by them in common with the public, but no further. But see, *contra*, *Whitfield v. Rogers*, 26 Miss., 84. As to the right of a municipal board of health, under the laws of New York, to enjoin a public nuisance, see *Gould v. City of Rochester*, 105 N. Y., 46, 12 N.

party complaining shows no special injury to himself different from the common injury to the public, he is not entitled to an injunction.<sup>23</sup> In accordance with these principles, where it is made to appear after injunction granted that the injury suffered by complainant is sustained by him in common with every taxpayer, and the damage is therefore not special or peculiar, the injunction will be dissolved.<sup>24</sup> And where the injury is doubtful and the evidence conflicting the relief will generally be withheld.<sup>25</sup> And especially will the relief be denied where, in addition to the plaintiff's failure to show some special damage, it appears that his title is in doubt and is denied by the defendant.<sup>26</sup> It is held, however, that the fact that proceedings have been or may be taken by the attorney-general in behalf of the people to restrain a public nuisance will not prevent an individual, who sustains a special injury, from obtaining the relief.<sup>27</sup> But it will not suffice that the person complaining merely shows a violation of his rights, but he must show such a violation as is or will be attached with serious damage.<sup>28</sup>

E., 275. As to the right of a private citizen to enjoin the sale of intoxicating liquors as a nuisance, under the statutes of Iowa, see *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W., 641; *Pontius v. Winebrenner*, 65 Iowa, 591, 22 N. W., 646; *Shermerhorn v. Webber*, 67 Iowa, 278, 25 N. W., 160; *Martin v. Blatner*, 68 Iowa, 286, 25 N. W., 131, 27 N. W., 244.

<sup>23</sup> *Hinchman v. Paterson H. R. Co.*, 2 C. E. Green, 75; *Shed v. Hawthorne*, 3 Neb., 179.

<sup>24</sup> *Allen v. Board*, 2 Beas., 68.

<sup>25</sup> *Earl of Ripon v. Hobart*, 3 Myl. & K., 169; *S. C., Coop. t. Brougham*, 333; *Hamilton v. New York*, 9 Paige, 171; *Springer v. Walters*, 139 Ill., 419, 28 N. E., 761.

<sup>26</sup> *Lownsdale v. Gray's H. B. Co.*, 117 Fed., 983.

<sup>27</sup> *Attorney-General v. Johnson*, 2 Wils. Ch., 87; *Attorney-General v. Forbes*, 2 Myl. & Cr., 123; *Cook v. Mayor*, L. R. 6 Eq., 177.

<sup>28</sup> *Bigelow v. Hartford Bridge Co.*, 14 Conn., 565. This was a bill in equity brought by the owner of buildings and land above a causeway which had been swept away, to restrain defendant from rebuilding the causeway. It appearing that no special injury was threatened to complainant's right, and that the injury and inconvenience resulting to him from the erection of the causeway would be small and not capable of appreciation, it was held that the injunction ought

§ 763. **The doctrine illustrated.** As illustrating the general doctrine above stated, denying relief by injunction against public nuisances in behalf of private citizens who suffer no special or peculiar injury different from that which is inflicted upon the public by the grievance in question, it is held that a private citizen can not enjoin the closing up of public streets, when he shows no peculiar injury personal to himself as the result of the act proposed.<sup>29</sup> So a private citizen, owning a wharf adjacent to navigable waters, can not restrain defendants from committing a purpresture, such as filling up a dock adjoining plaintiff's wharf, when he has no private right or easement in the dock itself, the fee being in the state.<sup>30</sup> And a mining and transportation company will not be allowed to restrain the erection of a grain elevator upon

to be refused. Storrs, J., says: "Of whatever character it is requisite that the injury complained of should be, in order to lay the foundation for this remedy, it is necessary that it should be a substantial and not merely a technical or inconsequential injury. There must not only be a violation of the plaintiff's rights, but such a violation as is or will be attended with actual and serious damage. Even although the injury may be such that an action at law would lie for damages, it does not follow that a court of equity would deem it proper to interpose by the summary, peculiar and extraordinary remedy of injunction. *Spencer v. London & Birmingham Railway Company*, 8 Simons, 193. It is obviously not fit that the power of that court should be invoked, in this form, for every theoretical or speculative violation of one's rights. Such an exercise of it would

not only be wide from the object of investing those courts with that power, but would render them engines of oppression and vexation, and bring them into merited odium. It is a power which is extraordinary in its character, and to be exercised generally only in cases of necessity, or where other remedies may be inadequate, and even then with great discretion and carefulness. It is a salutary, and indeed a necessary power when confined within those safe limits in which it has been exercised; but capable of being made an instrument of oppression, and therefore to be extended, if it all, with great circumspection. *Earl of Ripon v. Hobart*, 3 Mylne & Keene, 169."

<sup>29</sup> *Prince v. McCoy*, 40 Iowa, 533.

<sup>30</sup> *Engs v. Peckham*, 11 R. I., 210. And doubt is expressed by the court as to whether any person but the state can proceed by injunction against a purpresture.

a public wharf, to which the company shows no right or interest.<sup>31</sup> So when it is sought to enjoin the laying of a street railway upon a public street, the fact that one of the plaintiffs is a lot owner upon the street gives him no special right and subjects him to no special injury which entitles him to an injunction, a street railway not being a nuisance *per se*.<sup>32</sup> And in such a case it is not sufficient ground for awarding an injunction in behalf of such lot owner to allege generally that his lot will be injured by the proposed construction, but the facts should be shown from which the injury may be established.<sup>33</sup> Moreover the injury complained of must differ not merely in degree but in kind from that which is sustained by the public generally.<sup>34</sup>

§ 763 *a*. **Further illustrations.** As further illustrating the principle under discussion, relief has been denied where a private individual who was accustomed with many others to fish in the waters of a lake, sought to enjoin a city from destroying the fishing industry in the locality by dumping garbage into the lake;<sup>35</sup> to enjoin the maintainance of a gambling house, relief being sought by a non-resident;<sup>36</sup> to enjoin the maintenance of a toll-gate in a public highway;<sup>37</sup> to enjoin the municipal authorities from changing a public highway in such a way as to make it more circuitous for the plaintiff;<sup>38</sup> to enjoin the unauthorized granting of a

<sup>31</sup> Illinois Company *v.* St. Louis, 2 Dill., 70.

<sup>32</sup> Coast Line R. Co. *v.* Cohen, 50 Ga., 451; Van Horne *v.* Newark P. R. Co., 48 N. J. Eq., 332, 21 Atl., 1034; Placke *v.* Union D. R. Co., 140 Mo., 634, 41 S. W., 915.

<sup>33</sup> Coast Line R. Co. *v.* Cohen, 50 Ga., 451; Placke *v.* Union D. R. Co., 140 Mo., 634, 41 S. W., 915.

<sup>34</sup> Hay *v.* Weber, 79 Wis., 587, 48 N. W., 859, 24 Am. St. Rep., 737; Pittsburg, F. W. & C. R. Co. *v.*

Cheevers, 149 Ill., 430, 37 N. E., 49, 24 L. R. A., 156; Kinnear Mfg. Co. *v.* Beatty, 65 Ohio St., 264, 62 N. E., 341.

<sup>35</sup> Kuehn *v.* City of Milwaukee, 83 Wis., 583, 53 N. W., 912, 18 L. R. A., 553.

<sup>36</sup> Hill *v.* Pierson, 45 Neb., 503, 63 N. W., 835.

<sup>37</sup> Perkins *v.* M. & C. T. Co., 48 N. J. Eq. 499, 22 Atl., 180.

<sup>38</sup> Cherry *v.* City of Rock Hill, 48 S. C., 553, 26 S. E., 798.



liquor license;<sup>39</sup> to enjoin hackmen and cabmen from crowding upon the sidewalk in front of plaintiff's railroad depot for the purpose of soliciting the patronage of its passengers;<sup>40</sup> in all of which cases, and in numerous others, the relief is denied because of the failure of the plaintiff to show any damage to himself or to his property which differs in kind from that suffered by the public generally.

§ 764. **Distinction between information by attorney-general and bill by citizen.** When proceedings are had to enjoin a public nuisance, such as the pollution of a river by a board of municipal officers in violation of an act of parliament under which they are acting, a distinction is drawn, as to the necessity of proving an actual injury, between the case of an information filed by the attorney-general in behalf of the public, and a bill filed by private citizens in their own behalf. And in the former case it is held to be unnecessary for the attorney-general to establish any actual injury, the statute having prohibited the act complained of; while in the latter case it is held to be necessary for plaintiffs to prove that the act which they seek to enjoin is in fact a nuisance.<sup>41</sup> So the proper public officers may enjoin the unlawful obstruction of a public highway irrespective of the question of the damage inflicted.<sup>42</sup> But the rule as thus announced has been limited to cases of relief sought upon final hearing and it has accordingly been held that an injunction should not be granted upon an interlocutory application unless substantial injury to the public be shown.<sup>43</sup>

§ 765. **Floating elevator in harbor.** The use by defendants of a floating elevator in a canal or basin forming part of the

<sup>39</sup> *Nast v. Town of Eden*, 89 Wis., 610, 62 N. W., 409.

<sup>40</sup> *Pittsburg, F. W. & C. R. Co. v. Cheevers*, 149 Ill., 430, 37 N. E., 49, 24 L. R. A., 156.

<sup>41</sup> *Attorney-General v. Cocker-mouth Local Board*, L. R. 18 Eq., 172; *Attorney-General v. Shrews-*

*bury Bridge Co.*, 21 Ch. D., 752. And see *Attorney-General v. Acton Local Board*, 22 Ch. D., 221.

<sup>42</sup> *Smith v. McDowell*, 148 Ill., 51, 35 N. E., 141, 22 L. R. A., 393.

<sup>43</sup> *Stockton v. Central R. Co.*, 50 N. J. Eq., 52, 24 Atl., 964, 17 L. R. A. 97.

harbor of a city, for the purpose of transferring grain in bulk from vessels to canal boats, does not constitute such a public nuisance as to warrant an injunction upon the application of the attorney-general in behalf of the people. And this is true, even though the use of such elevator sometimes causes temporary inconvenience and slight obstruction to navigation; since in such a case the court will balance the public benefit resulting from the act complained of against the private and temporary inconvenience resulting from such act.<sup>44</sup>

§ 766. **Obstruction of navigable river by dam.** The obstruction of a navigable river by the erection of a dam constitutes such a public nuisance or purpresture as to justify the interposition of equity by injunction; and when the supreme court of the state is empowered to issue the writ of injunction as a branch of its original jurisdiction, it may, in such a case, entertain an information by the attorney-general to restrain the proposed erection.<sup>45</sup> Where, however, the municipal authorities of a city are proceeding to erect a dam over a navigable river, under an act of legislature which expressly restricts the construction so that it shall not obstruct navigation, the court will not assume in advance that it is impossible to pursue the power as granted, nor will it restrain the erection upon the assumed ground that the dam will obstruct navigation.<sup>46</sup>

§ 767. **Effect of legislative sanction.** A public nuisance can not exist in acts which are warranted by law or authorized by legislative sanction, even though the act complained of might, independent of statute, be a nuisance.<sup>47</sup> Nor will a charge in the bill of special and peculiar injury to the com-

<sup>44</sup> *People v. Horton*, 64 N. Y., 610, affirming S. C., 5 Hun, 516. See *Hart v. Mayor*, 9 Wend., 572, affirming S. C., 3 Paige, 213.

<sup>45</sup> *Attorney-General v. City of Eau Claire*, 37 Wis., 400.

<sup>46</sup> *State v. City of Eau Claire*, 40 Wis., 533.

<sup>47</sup> *McFarland v. Orange & N. H. C. R. Co.*, 2 Beas., 17; *Hinchman v. Paterson H. R. Co.*, 2 C. E. Green, 75; *Hogencamp v. Same*,

plainant avail, if the work sought to be restrained is authorized by legislative enactment.<sup>48</sup>

§ 768. **Obstruction of water in city; obstruction of square; prize-fights.** The erection of a foundation wall as a support for a building in such manner as to obstruct the natural flow of water in a river flowing through a city, thereby contributing to the overflow of the banks in high water, is a public nuisance, which will be enjoined at the suit of the city corporation.<sup>49</sup> And the owners of adjacent lots are entitled to an injunction against the obstruction of a square dedicated to public use;<sup>50</sup> or the bill may be filed by the corporate authorities of the town, with whom may be joined private citizens affected by the nuisance.<sup>51</sup> So the erection of a bay window projecting beyond the building line and into a public street is such an encroachment upon the public highway as to constitute a public nuisance, which may be enjoined upon an information by the attorney-general.<sup>52</sup> So the maintenance of an establishment for the holding of prize fights may be enjoined as a public nuisance in a bill filed by the public officials.<sup>53</sup>

§ 769. **Violation of private right necessary.** Equity will not restrain the continuance of a public nuisance in behalf of

Ib., 83; Attorney-General *v.* New York & L. B. R. Co., 9 C. E. Green, 49; Rex *v.* Pease, 4 B. & A., 30; Sawyer *v.* Davis, 136 Mass., 239, 49 Am. St. Rep., 27; Murtha *v.* Lovewell, 166 Mass., 391, 44 N. E., 347, 55 Am. St. Rep., 410. And see Bordentown Road *v.* Camden R. Co., 2 Harr., 314; Davis *v.* Mayor, 14 N. Y., 506; Attorney-General *v.* Conservators, 1 Hem. & M., 1. But see, *contra*, LeClercq *v.* Trustees, 7 Ohio, 218.

<sup>48</sup> Hogencamp *v.* Paterson H. R. Co., 2 C. E. Green, 83.

<sup>49</sup> Rochester *v.* Erickson, 46 Barb., 92.

<sup>50</sup> Williams *v.* Smith, 22 Wis., 594; LeClercq *v.* Trustees, 7 Ohio, 354; Trustees *v.* Cowen, 4 Paige, 510.

<sup>51</sup> Trustees *v.* Cowen, 4 Paige, 510. And see further, as to joinder of corporate authorities and private citizens to enjoin a public nuisance, Mayor *v.* Bolt, 5 Ves., 129.

<sup>52</sup> Reimer's Appeal, 100 Pa. St., 182.

<sup>53</sup> Columbian Athletic Club *v.* State, 143 Ind., 98, 40 N. E., 914, 28 L. R. A., 728, 52 Am. St. Rep., 407.

a private citizen, merely because it contravenes the general policy, in the absence of any violation of private right. An injunction will therefore be withheld against the perpetration of an act prohibited by public statute, the only ground urged for the relief being the diminution of the profits of a trade or business pursued by complainant in common with others.<sup>54</sup>

§ 770. **Navigable creek; pendency of criminal proceedings.** The only ground upon which the obstruction of a navigable creek or river can be enjoined is the hindrance to navigation, and where the stream is not in fact navigated, and has not been for many years, the injunction will be denied.<sup>55</sup> But the fact that criminal proceedings are pending for the abatement of the nuisance will not prevent the interference of equity. Thus, the proprietor of a mill-dam, the back water from which constitutes a nuisance, may be enjoined in behalf of the people, pending an indictment against him for the same offense, where the right of the public is clear and the injury irreparable.<sup>56</sup>

§ 771. **Adverse user no bar to relief.** In considering the subject of injunctions to restrain private nuisances, it is elsewhere shown that twenty years adverse user and possession under a claim of right constitute an effectual bar to the exercise of the jurisdiction.<sup>57</sup> The rule does not, it would seem, prevail in cases of public nuisance, and it is held that no period of use or occupancy, however extended and uninterrupted, or under whatever claim of right, will prevent a court of equity from restraining the perpetuation of such a nuisance by additions and repairs.<sup>58</sup>

§ 771*a*. **Wasting of natural gas.** The wasting of natural gas upon which a large number of persons rely for heat-

<sup>54</sup> *Smith v. Lockwood*, 13 Barb., 209.

<sup>55</sup> *Gilbert v. Morris C. & B. Co.*, 4 Halst. Ch., 495; *State v. Carpenter*, 68 Wis., 165.

<sup>56</sup> *Attorney-General v. Hunter*, 1 Dev. Eq., 12. And see further, as

to injunction against a nuisance pending an indictment for the same offense, *People v. St. Louis*, 5 Gilm., 351.

<sup>57</sup> See § 799, *post*.

<sup>58</sup> *Rochester v. Erickson*, 46 Barb., 92.

ing purposes and for fuel may be enjoined as a public nuisance in a bill filed by the state.<sup>59</sup> So the use of artificial means which are employed, in violation of the provisions of a statute, to increase the natural flow of such gas and which are calculated to reduce or cut off the supply, may be enjoined as a nuisance by an association of manufacturers who rely upon the use of the gas for the operation of their plants.<sup>60</sup> But where the statute prohibits the maintenance of natural gas at a pressure of more than three hundred pounds to the square inch, the statute being designed not for the preservation of the supply but as an exercise of the police power to prevent the storage under great pressure of a highly inflammable and explosive substance, and the consequent danger attendant thereon, private individuals such as an association of manufacturers can not enjoin the maintenance of gas at a greater pressure than that allowed by law where no damage actual or threatened is apprehended and where they show no injury different in kind from that which will be suffered by the public generally.<sup>61</sup> And where a statute attempts to prohibit the transportation and sale of natural gas beyond the limits of the state, such enactment, in so far as it applies to gas which has been reduced to possession, can not be sustained as a valid exercise of the police power, and the sale of such gas contrary to the provisions of the act will therefore not be enjoined.<sup>62</sup>

<sup>59</sup> *State v. Ohio Oil Co.*, 150 Ind., Ind. N. G. & O. Co., 155 Ind., 566, 58 21, 49 N. E., 809, 47 L. R. A., 627. N. E., 851.

<sup>60</sup> *Manufacturers G. & O. Co. v.* <sup>62</sup> *Manufacturers G. & O. Co. v.* Ind. N. G. & O. Co., 155 Ind., 461, Ind. N. G. & O. Co., 155 Ind., 545, 57 N. E., 912, 50 L. R. A., 768. 58 N. E., 706, 53 L. R. A., 134.

<sup>61</sup> *Manufacturers G. & O. Co. v.*



## III. NUISANCES TO DWELLINGS.

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§ 772. **The general rule stated.** The most frequent instance of nuisances of a strictly private nature occurs in the erection of structures obnoxious or hurtful to buildings used for residence and business purposes. The law may be regarded as settled, that when a business, although lawful in itself, becomes obnoxious to neighboring dwellings and renders their

enjoyment uncomfortable, whether by smoke, cinders, noise, offensive odors, noxious gases, or otherwise, the carrying on of such business is a nuisance which equity will restrain.<sup>1</sup> Nor is it necessary that the nuisance be injurious to health to warrant the interference,<sup>2</sup> but mere noise will, in a proper case, suffice to justify a court of equity in interfering,<sup>3</sup> and the relief has been granted against the ringing of bells in a church in such manner as to annoy a neighboring resident.<sup>4</sup> So maintaining a skating rink so near to plaintiff's residence as to cause serious noise and disturbance to plaintiffs in the enjoyment of their property has been enjoined.<sup>5</sup> And the fact that the nuisance is not perpetual, but will only recur occasionally, and then but for a short period, will not avail the defendant if it be an unmistakable nuisance.<sup>6</sup>

§ 773. **Peril to health and comfort, ground for relief; illustrations of the rule.** Where loss of health, destruction of business and irreparable injury to property will result from the obnoxious erections, equity will not hesitate to interfere. Thus, the burning of brick so near a dwelling as to expose the premises to danger from fire and to imperil the health of the inmates,<sup>7</sup> or the erection of a chandlery,<sup>8</sup> or of a

<sup>1</sup> *Ross v. Butler*, 4 C. E. Green, 294; *Cleveland v. Citizens*, 5 C. E. Green, 201; *Babcock v. New Jersey S. Y. Co.*, 5 C. E. Green, 296; *Snyder v. Cabell*, 29 West Va., 48, 1 S. E., 241; *Price v. Oakfield H. C. Co.*, 87 Wis., 536, 58 N. W., 1039, 24 L. R. A., 333. And see *Attorney-General v. Steward*, 29 West Va., 415; *Robinson v. Baugh*, 31 Mich., 290; *Hutchins v. Smith*, 63 Barb., 251; *Imperial Co. v. Broadbent*, 7 H. L., 600; *Benner v. Junker*, 190 Pa. St., 423, 42 Atl., 72.

<sup>2</sup> *Ross v. Butler*, 4 C. E. Green, 294.

<sup>3</sup> *White v. Cohen*, 1 Drew., 313; *Snyder v. Cabell*, 29 West Va., 48, 1 S. E., 241.

<sup>4</sup> *Soltau v. DeHeld*, 2 Sim. N. S., 133.

<sup>5</sup> *Snyder v. Cabell*, 29 West Va., 48, 1 S. E., 241.

<sup>6</sup> *Ross v. Butler*, 4 C. E. Green, 294.

<sup>7</sup> *Fuselier v. Spalding*, 2 La. An., 773; *Walter v. Selfe*, 4 Eng. L. & E., 15; S. C., 4 DeG. & Sm., 315; *White v. Jameson*, L. R. 18 Eq., 303.

<sup>8</sup> *Howard v. Lee*, 3 Sandf., 281.

slaughter house,<sup>9</sup> or of a livery stable,<sup>10</sup> or of a cemetery,<sup>11</sup> or the operating of lime kilns,<sup>12</sup> or of a bone factory and rendering establishment,<sup>13</sup> or of gas works,<sup>14</sup> or cement works,<sup>15</sup> or of a fertilizer factory,<sup>16</sup> or of a carpet cleaning establishment,<sup>17</sup> or of a planing mill,<sup>18</sup> if so near a residence as to imperil the comfort or health of its inmates, will be enjoined. And mere smoke or disagreeable odors, although not noxious, may be sufficient ground for the interference of equity. So offensive noises may afford ground for relief, the main question in all such cases being whether the annoyance is such as materially to interfere with the ordinary comfort of human existence.<sup>19</sup> So, too, stench and odors resulting from a manufacturing business, which are of an offensive nature and injurious to the public health, may be enjoined as a nuisance.<sup>20</sup> And the manufacture of vitrol and sulphuric acid in a factory adjoining plaintiff's premises constitutes such a nuisance as entitles him to maintain a bill for an injunction.<sup>21</sup> And the keeping of jacks and stallions across

<sup>9</sup> *Peck v. Elder*, 3 Sandf., 126; 199; *City of Grand Rapids v. Wieden*, 97 Mich., 82, 56 N. W., 233; *Reichert v. Geers*, 98 Ind., 73; *Millhiser v. Willard*, 96 Iowa, 327, 65 N. W., 325.

<sup>14</sup> *Imperial Co. v. Broadbent*, 7 H. L., 600.

<sup>15</sup> *Umfreville v. Johnson*, L. R. 10 Ch. App., 580.

<sup>16</sup> *Evans v. Reading C. F. Co.*, 160 Pa. St., 209, 28 Atl., 702.

<sup>17</sup> *Rodenhausen v. Craven*, 141 Pa. St., 546, 21 Atl., 774, 23 Am. St. Rep., 306.

<sup>18</sup> *Rogers v. Week Lumber Co.*, 117 Wis., 5.

<sup>19</sup> *Crump v. Lambert*, L. R. 3 Eq., 409; S. C., 17 L. T. N. S., 133.

<sup>20</sup> *Butterfoss v. State*, 40 N. J. Eq., 325; *Williams v. Osborne*, 40 N. J. Eq., 235.

<sup>21</sup> *Chappell v. Funk*, 57 Md., 465;

<sup>10</sup> *Coker v. Birge*, 9 Ga., 425; *Same v. Same*, 10 Ga., 336. But a livery stable in a city is not a nuisance *per se*, and will not, therefore, be enjoined absolutely, although its use may be enjoined to such an extent as it is a nuisance in fact. *Shiras v. Olinger*, 50 Iowa, 571.

<sup>11</sup> *Jung v. Neraz*, 71 Tex., 396, 9 S. W., 344.

<sup>12</sup> *Hutchins v. Smith*, 63 Barb., 251.

<sup>13</sup> *Meigs v. Lister*, 8 C. E. Green,

the street from and in front of plaintiff's residence may also be enjoined.<sup>22</sup> So maintaining a small pox hospital in close proximity to plaintiff's dwelling will warrant an interlocutory injunction until a final hearing of the cause.<sup>23</sup> And when a city unlawfully permits the use of a street for market purposes in front of plaintiff's premises, causing offensive odors, loud noises and disturbance to plaintiff and his family, the city may be restrained from permitting the continuance of such nuisance.<sup>24</sup> And a municipal corporation, which is proceeding without legal authority to construct a sewer upon or near plaintiff's premises, which will probably result in great injury to the health of the plaintiff and his family by discharging sewage upon or in the immediate vicinity of his land, may be enjoined from so doing.<sup>25</sup> And in such a case a railroad company may enjoin the municipal authorities from discharging sewage upon its right of way.<sup>26</sup> So the discharge of sewage from defendant's premises upon those of plaintiff's, thereby seriously endangering health, may be enjoined as a nuisance.<sup>27</sup> So where defendant has connected his premises with a private sewer owned by the plaintiff and is proceeding to make use of it without the latter's consent, with the result that the pipes are clogged and the contents are deposited in plaintiff's basement, such use by the defendant will be enjoined.<sup>28</sup> And the unauthorized use by a railway company of the streets of a city for maintaining its

*Georgia Chemical Co. v. Colquitt*, 72 Ga., 172.

<sup>22</sup> *Farrell v. Cook*, 16 Neb., 483, 20 N. W., 720.

<sup>23</sup> *Bendelow v. Guardians*, 57 L. J. R. N. S. Ch., 762.

<sup>24</sup> *McDonald v. Newark*, 42 N. J. Eq., 136, 7 Atl., 855. See as to the right to enjoin the maintenance of a blacksmith shop on the ground of nuisance, *Whitaker v. Hudson*, 65 Ga., 43.

<sup>25</sup> *Butler v. Mayor*, 74 Ga., 570; *Mayor v. Houk*, 113 Ga., 963, 39 S. E., 577; *Dierks v. Commissioners of Highways*, 142 Ill., 197, 31 N. E., 496.

<sup>26</sup> *New York C. & H. R. Co. v. City of Rochester*, 127 N. Y., 591, 28 N. E., 416.

<sup>27</sup> *Evans v. Wilmington & W. R. Co.*, 96 N. C., 45, 1 S. E., 529.

<sup>28</sup> *Boyd v. Walkley*, 113 Mich., 609, 71 N. W., 1099.

side tracks, resulting in continuous injury to an adjacent property owner by reason of noise and smoke, may be enjoined as a nuisance.<sup>29</sup> And the owner of a building may enjoin as a nuisance the maintenance of a tower upon the roof of an adjoining building upon which, during cold weather, ice is formed as the result of the precipitation of spray from a neighboring water-fall, which, in thawing, falls off in pieces of sufficient size to injure plaintiff's property and endanger life thereon.<sup>30</sup> So the noise and pounding resulting from the use of a locomotive turntable in such a way as to cause injury to adjoining property and great annoyance and discomfort to the inmates affords sufficient ground for an injunction.<sup>31</sup> And relief has been allowed upon behalf of a property owner restraining a city from maintaining manholes in a highway in such condition as to allow the escape of poisonous gases.<sup>32</sup> While it would seem that an intentional and wanton disturbance of the peace and comfort of plaintiff's home by his neighbors affords sufficient ground for an injunction, yet the relief will be denied where the plaintiff is as much at fault in the manner complained of as is the defendant and therefore fails to come into equity with clean hands.<sup>33</sup>

§ 774. **Considerations governing the court.** To justify a court of equity in enjoining a nuisance of the class under consideration, the person aggrieved must show to the court some actual, substantial damage and not merely a remote, contingent, or prospective injury.<sup>34</sup> Moreover the evidence

<sup>29</sup> *Kavanagh v. Mobile & G. R. Co.*, 78 Ga., 271, 2 S. E., 636.

<sup>30</sup> *Davis v. Niagara Falls Co.*, 171 N. Y., 336, 64 N. E., 4, 57 L. R. A., 545, 89 Am. St. Rep. 817.

<sup>31</sup> *Garvey v. L. I. R. Co.*, 159 N. Y., 323, 54 N. E., 57, 70 Am. St. Rep., 550.

<sup>32</sup> *City of Atlanta v. Warnock*, 91 Ga., 210, 18 S. E., 135, 23 L. R. A.,

301, 44 Am. St. Rep., 17.

<sup>33</sup> *Medford v. Levy* 31 West Va., 649, 8 S. E., 302, 2 L. R. A., 368, 13 Am. St. Rep., 887.

<sup>34</sup> *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch., 705. And see this case as to the weight to be given to scientific evidence in such cases.



must be clear as to the existence of the nuisance and if it is conflicting and leaves the question in doubt, the plaintiff will be left to his remedy at law.<sup>35</sup> Nor will equity enjoin the proposed erection as a nuisance, merely because it will obstruct the view of plaintiff's place of business.<sup>36</sup> Nor is the reversioner, or owner in fee of premises occupied by a tenant, entitled to enjoin the maintenance of a structure upon adjoining premises, when no positive injury to the reversion is shown, and when it does not appear that such structure is of a permanent character.<sup>37</sup> And upon an application to restrain a nuisance consisting in the noise created by a manufacturing establishment upon adjacent premises, the question for determination by the court is largely a question as to degree, to be determined by the circumstances of the particular case.<sup>38</sup> So upon an application to enjoin a nuisance resulting from defendant's process of manufacturing, the court will consider whether the injury complained of is permanent and repeated, or merely accidental and occasional. And if it appears that it is of the latter class, and that the business is conducted with due care and precaution, the relief may be withheld, but without prejudice to plaintiff's right to bring his action at law.<sup>39</sup> But to warrant an injunction against odors and gases from an offensive business it is not necessary that the odors should be noxious, and if they are so offensive and disagreeable as to render life uncomfortable, equity may interfere.<sup>40</sup> And the fact that the nuisance recurs only when the wind is in a given direction, or that it is surrounded by other nuisances, does not deprive plaintiffs of their right to relief.<sup>41</sup> But where the acts

<sup>35</sup> *Nelson v. Milligan*, 151 Ill., 462, 38 N. E., 239.

<sup>36</sup> *Butt v. Imperial Gas Co.*, L. R. 2 Ch., 158.

<sup>37</sup> *Cooper v. Crabtree*, 19 Ch. D., 193.

<sup>38</sup> *Gaunt v. Fynney*, L. R. 8 Ch.,

8. See also *Dittmann v. Repp*, 50 Md., 516.

<sup>39</sup> *Cook v. Forbes*, L. R., 5 Eq., 166.

<sup>40</sup> *Meigs v. Lister*, 8 C. E. Green, 199. See *Duffy v. Meadows*, 131 N. C., 31, 42 S. E., 460.

<sup>41</sup> *Meigs v. Lister*, 8 C. E. Green,

complained of do not constitute a nuisance and the plaintiff is acting strictly within his legal rights, relief will not be granted upon the ground that such acts may greatly endanger the life of plaintiff who is in very weak health.<sup>42</sup>

§ 775. **Cattle yards; manufacture of gas.** Illustrations of the relief in cases of nuisances to dwellings are multiform, the principle common to them all being the injury to the health, comfort or convenience of the residents. Thus, the smell or stench arising from the keeping of live hogs or cattle in yards in such numbers and for such length of time as to affect the health or comfort of surrounding residents, is a nuisance which equity will enjoin.<sup>43</sup> And permitting blood and other offal from such animals to run into the waters of a bay may also be enjoined as a nuisance.<sup>44</sup> So the manufacture of gas in such manner as to produce serious annoyance to persons dwelling in adjoining houses, whether by smoke, gases, effluvia, or odors that may issue from the works, is such a nuisance as to warrant the interposition of a court equity by injunction.<sup>45</sup> And the manufacture of gas so near to plaintiff's premises as to injure his vegetation and crops may be enjoined as a nuisance.<sup>46</sup> But the erection of buildings to be used for the manufacture of gas will not necessarily be enjoined, before it is shown that the works will be conducted in such manner as to cause substantial discomfort.<sup>47</sup>

199; *Evans v. Reading C. F. Co.*, Attorney-General *v. Steward*, 5 C. 160 Pa. St., 209, 28 Atl., 702. See *E. Green*, 415.

*Duffy v. Meadows*, 131 N. C., 31, 42 S. E., 460. <sup>45</sup> *Cleveland v. Citizens G. L. Co.*, 5 C. E. Green, 201.

<sup>42</sup> *Lord v. DeWitt*, 116 Fed., 713.

<sup>43</sup> *Babcock v. New Jersey S. Y. Co.*, 5 C. E. Green, 296; *Baker v. Bohannon*, 69 Iowa, 60, 28 N. W., 435. And see *Trulock v. Merte*, 72 Iowa, 510, 34 N. W., 307. <sup>46</sup> *Broadbent v. Imperial Gas Co.*, 7 DeGex, M. & G., 436.

<sup>47</sup> *Cleveland v. Citizens G. L. Co.*, 5 C. E. Green, 201. This was a bill to restrain the erection of gas works in such proximity to complainants' residences as to render them uncomfortable. The prin-

<sup>44</sup> *Babcock v. New Jersey S. Y. Co.*, 5 C. E. Green, 296. And see

§ 776. **Powder house.** The erection of a powder house, or magazine for storing powder or other explosives, so near to plaintiff's premises as to endanger their safety presents a nuisance of such a character as to entitle plaintiff to an injunction.<sup>48</sup> But in cases of this character, it is sometimes a

ciples governing courts of equity in this class of cases are laid down by Zabriskie, Chancellor, as follows: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise and bad odors, even when not injurious to health, may render a dwelling so uncomfortable, as to drive from it any one not compelled by poverty to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect. The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so, because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons or classes

of persons whose senses have not been so hardened, and who by their education and habits of life retain the sensitiveness of their natural organization, are entitled to enjoy life in comfort as they are constituted. The law knows no distinction of classes, and will protect any citizen or classes of citizens, from wrongs and grievances that might perhaps be borne by others, without suffering or much inconvenience. The complainants have houses built, and held for the purpose of residences, by families of means and respectability, and anything that by producing physical discomfort would render them unfit for such residences, or drive such families from them, is a nuisance, which the law will restrain. This, then, is the question before me: whether the proposed works of the defendants would produce such annoyance as would render such families, composed of women and children as well as men, uncomfortable; not whether men accustomed to follow their occupations in places where they are surrounded, and unavoidably, by much that is offensive, may not be so accustomed to odors of like nature as not to be annoyed by these."

<sup>48</sup> Wier's Appeal, 74 Pa. St., 230; People's Gas Co. v. Tyner, 131 Ind., 277, 31 N. E., 59, 16 L. R. A., 443, 31 Am. St. Rep. 433.

grave question whether so great an injury would not be caused to the public by enjoining the business that the party aggrieved should be left to pursue his remedy at law. And in determining whether to enjoin the construction of a powder house, the court will be governed by the real character of the location and its surroundings, and by the relation of the industry in question to the public and to the business interests of the vicinity. Where, therefore, a powder house is indispensable in carrying on important branches of industry, and it is located about two miles from the nearest closely settled district, separated therefrom by intervening hills and ravines, in a sparsely settled locality where there is no likelihood of any demand for land for building purposes, there is no sufficient reason for sustaining an injunction against the proposed erection.<sup>49</sup>

§ 777. **Burning brick; forging iron; storing inflammable material; rifle range; soot; smelting works; engine house; garbage; machine shop; tobacco drying shed.** It is also held that the burning of brick by the use of anthracite coal, by means of which noxious gases are generated adjacent to plaintiff's residence, resulting in the destruction of plaintiff's trees and shrubbery, constitutes such a nuisance as to call for relief by injunction.<sup>50</sup> And a defendant may be enjoined from permitting soot to issue from a smoke stack upon his premises in a city, to the annoyance and injury of plaintiff and his family.<sup>51</sup> And the maintenance of works for smelting lead so near to plaintiff's farm and residence that the fumes and noxious vapors thereby generated render the land unfit for cultivation, destroy cattle and imperil the health and comfort of plaintiff, affords sufficient ground for re-

<sup>49</sup> *Dilworth v. Robinson*, 12 Chicago Legal News, 196; *S. C. sub nom.*, *Dilworth's Appeal*, 91 Pa. St., 247.

see this case for a review of the authorities relating to the burning of brick as a nuisance.

<sup>50</sup> *Campbell v. Seaman*, 63 N. Y., 568, S. C., *Thomp. & C.*, 231. And

<sup>51</sup> *Sullivan v. Royer*, 72 Cal., 248, 13 Pac., 655.

lief by injunction.<sup>52</sup> So a railway company may be restrained from maintaining an engine house for locomotives so near to plaintiff's dwelling as to endanger health and to render plaintiff's premises untenable by reason of smoke, cinders and soot. Nor, in such case, can the railway company justify the nuisance upon the ground that the engine house is a necessity in the operation of its road, no express legislative authority being shown for its maintenance.<sup>53</sup> And the throwing of filth and garbage by an adjacent property owner upon plaintiff's premises, thereby causing constant annoyance and damage, may be enjoined.<sup>54</sup> So the business of forging iron, which is conducted by defendant upon an extended scale with the use of bituminous coal and employing large trip-hammers in a quarter of a city occupied substantially for residence purposes, may be enjoined at the suit of plaintiffs who are the owners and occupants of valuable residences in the immediate vicinity. In such a case, the smoke and soot from the business, with the noise and danger to comfort and health, afford strong ground for equitable relief. Nor does it afford sufficient objection to the relief, under such circumstances, that plaintiffs themselves have in the same vicinity establishments which are open to the same complaint, or that similar nuisances are maintained in the vicinity by other persons.<sup>55</sup> So the storing of inflammable material, such as damp jute, so near to plaintiff's premises as to endanger them by fire may be enjoined upon the same ground.<sup>56</sup> And the use of a rifle range in

<sup>52</sup> *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St., 116.

<sup>53</sup> *Cogswell v. New York, N. H. & H. R. R. Co.*, 103 N. Y., 10, 8 N. E., 537.

<sup>54</sup> *Lowe v. Holbrook*, 71 Ga., 563.

<sup>55</sup> *Robinson v. Baugh*, 31 Mich., 290.

<sup>56</sup> *Hepburn v. Lordan*, 2 Hem. &

M., 345. And in this case the injunction was allowed in a form which made it practically mandatory, since it restrained defendants from allowing the damp jute already on their premises to remain there, as well as enjoined them from bringing any more upon the premises.



such manner as to cause great danger to plaintiff and his family by shooting across his premises may be enjoined.<sup>57</sup> And the operation of a machine and blacksmith shop which has been erected against the protests of property owners in a neighborhood given up to fine and costly residences and which results in smoke, soot, einders, offensive odors and great noise, will be enjoined as a nuisance.<sup>58</sup> So an injunction has been granted against the maintenance of a tobacco drying shed from which vile and noxious odors arose and permeated plaintiff's building, causing great discomfort and injury to health.<sup>59</sup>

§ 778. **Place of entertainment; horse races; beer garden; circus; playing croquet.** The collection of a large and disorderly crowd of people in a place where public entertainments are held, adjoining plaintiff's premises, and the noise of fireworks with the danger of fire thereby caused, accompanied by the playing of bands of music, have been held to constitute such a nuisance as to entitle plaintiff to an injunction.<sup>60</sup> So the carrying on of horse races on Sundays which were conducted in a disorderly and unusual manner, accompanied by cheers of the spectators and the shouts of the bookmakers, thereby seriously disturbing the holding of religious services in the vicinity, has been enjoined as a nuisance.<sup>61</sup> So relief has been allowed against the maintenance of a disorderly beer garden where crowds of people congregated day and night, becoming intoxicated and indulging in coarse, profane and vulgar language, to the great

<sup>57</sup> McKillopp v. Taylor, 10 C. E. Green, 139. As to the right to an injunction to prevent a military officer in the public service from causing or permitting rifle practice upon a common in close proximity to plaintiff's house, see Hawley v. Steele, 6 Ch. D., 521.

<sup>58</sup> McMorran v. Fitzgerald, 106

Mich., 649, 64 N. W., 569, 58 Am. St. Rep., 511.

<sup>59</sup> Hundley v. Harrison, 123 Ala., 292, 26 So., 294.

<sup>60</sup> Walker v. Brewster, L. R. 5 Eq., 25.

<sup>61</sup> Dewar v. City & S. R. Co., (1899) 1 L. R. Ir., 345.

annoyance of the plaintiff and his family.<sup>62</sup> But where the nuisance complained of consisted in the establishment of a circus in the vicinity of plaintiff's premises, an injunction was refused when sought upon the ground that the circus would draw together a large number of disorderly people, but granted upon the ground of the noise thereby occasioned, to the inconvenience of plaintiff's family.<sup>63</sup> But an injunction has been refused against the playing of croquet upon a lot opposite plaintiff's house after nightfall and sometimes as late as eleven o'clock, by the light of torches attached to the wickets, where it appeared that the game was not conducted in a boisterous or disorderly manner and with no more noise than is usual in such cases nor with the malicious motive of annoying the plaintiff, although it was a great source of annoyance and a cause of extreme nervousness to the plaintiff who was far advanced in pregnancy.<sup>64</sup>

§ 779. **Ringings of bells.** Upon the like ground of preventing a nuisance consisting in a disturbing noise, the ringing of bells has already been mentioned as ground for injunction in behalf of a neighboring resident.<sup>65</sup> And where plaintiff's house was located so near to a church that the ringing of a bell at an early hour in the morning greatly disturbed plaintiffs, and they entered into an agreement with the church authorities, for a valuable consideration, that the bell should not during their lives be rung in the morning, they were protected by injunction from the ringing of the bell in violation of the agreement.<sup>66</sup> And an injunction has been granted against the loud and discordant blowing of steam whistles at unnecessary and unreasonable hours.<sup>67</sup>

<sup>62</sup> *Kissel v. Lewis*, 156 Ind., 233, 59 N. E., 478.

<sup>65</sup> See *Soltau v. DeHeld*, 2 Sim. N. S., 133.

<sup>63</sup> *Inchbald v. Robinson*, and *Inchbald v. Barrington*, L. R. 4 Ch., 388.

<sup>66</sup> *Martin v. Nutkin*, 2 P. Wms., 266.

<sup>64</sup> *Akers v. Marsh*, 19 App. D. C., 28. See this case as to the test to be applied in such cases.

<sup>67</sup> *Hill v. McBurney O. & F. Co.*, 112 Ga., 788, 38 S. E., 42, 52 L. R. A., 398.

§ 780. **Test in crowded cities; adjacent stable; cooking range; privy; urinal; tenement houses.** Upon the question of what constitutes a nuisance to dwellings in populous cities the rule is, in general terms, as regards cases of adjoining houses, that if either party devotes his house or any portion of it to unusual or extraordinary purposes in such manner as to produce a substantial injury to his neighbor, such use of the premises will not be regarded as a reasonable use and the person sustaining such substantial injury is entitled to the aid of an injunction. Thus, the use of a building adjoining plaintiff's, in a large city, as a stable and the keeping of horses therein, causing annoyance and loss to plaintiff in his business as a lodging-house keeper, constitutes such a nuisance as will be enjoined.<sup>68</sup> So the keeping of horses in a stable adjoining plaintiff's premises and the noise resulting therefrom, with the fact of moisture and dampness passing through from defendant's stable to plaintiff's wall, afford sufficient ground for relief by injunction.<sup>69</sup> And the use of a range for cooking purposes in a restaurant underneath plaintiff's apartment causing an unreasonable amount of heat and smell, has been enjoined as a nuisance.<sup>70</sup> So relief has been granted against the use of a stove in defendant's kitchen in such a way as to render plaintiff's wine cellar so hot as to be unfit for the storage of wine.<sup>71</sup> And the erection and maintenance of a privy without plaintiff's consent, in a yard owned in common by plaintiff and defendant, or partly upon defendant's premises and partly upon a private alley, may be enjoined.<sup>72</sup> And in general the erection of a privy so close to plaintiff's dwelling as to result in great discomfort and in-

<sup>68</sup> Ball v. Ray, L. R. 8 Ch., 467.

<sup>71</sup> Reinhardt v. Mentasti, 42 Ch.

<sup>69</sup> Broder v. Saillard, 2 Ch. D., 192.

D., 685; S. C., 58 Law Journal Rep. (N. S.) Ch., 787.

<sup>70</sup> Sanders-Clark v. Grosvenor Mansions Co., (1900) 2 Ch., 373.

<sup>72</sup> Kenopsky v. Davis, 27 La. An., 174; De Givie v. Seltzer, 64 Ga., 423.

jury to health will be enjoined.<sup>73</sup> Nor is it a defense to the maintenance of such a nuisance that the defendant intends to counteract its evil effects by the use of disinfectants.<sup>74</sup> And an injunction is properly granted against the maintenance of sinks and urinals in the premises adjoining the plaintiffs, which are so imperfectly connected with the sewers that the filth and refuse penetrates plaintiff's cellar wall, forming noxious and offensive pools upon his premises which render them unfit for habitation.<sup>75</sup> So the municipal authorities will be enjoined from draining the waterclosets and urinals of a public building, such as a court house in process of construction, in such a way that the refuse will be deposited upon plaintiff's land.<sup>76</sup> But an injunction has been refused against the erection of a urinal by a municipal corporation, when it did not appear that defendants were transcending their powers, and when it was not shown that the proposed erection would constitute a nuisance.<sup>77</sup> Nor will the owner of real estate in a city be enjoined, at the suit of an adjacent property owner, from erecting tenement houses upon his premises, upon the ground that they are to be occupied by colored families for the purpose of annoying plaintiff.<sup>78</sup>

§ 781. **Further test; machinery operated by steam; printing presses; plaintiff guilty of nuisance.** In determining whether a proper case is presented for relief by injunction against nuisances to buildings in cities, a satisfactory test is, whether the matter complained of produces such a condition of things as in the judgment of reasonable men is productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and such as, in

<sup>73</sup> *Wahle v. Reinbach*, 76 Ill., 322;  
*Radican v. Buckley*, 138 Ind., 582,  
 38 N. E., 53.

<sup>74</sup> *Radican v. Buckley*, 138 Ind.,  
 582, 38 N. E., 53.

<sup>75</sup> *Fleischner v. Citizens I. Co.*, 25  
 Ore., 119, 35 Pac., -174.

<sup>76</sup> *Pierce v. Gibson County*, 107  
 Tenn., 224, 64 S. W. 33, 55 L. R. A.,  
 477, 89 Am. St. Rep., 946.

<sup>77</sup> *Biddulph v. Vestry of St.  
 George*, 3 DeG., J. & S., 493.

<sup>78</sup> *Falloon v. Schilling*, 29 Kan.,  
 292.

view of the circumstances of the case, is unreasonable and in derogation of plaintiff's rights. Applying this test, the noise caused by the operation of machinery by steam upon premises adjoining plaintiff's dwelling, together with the vibratory and jarring effect produced by such machinery upon plaintiff's house, rendering the walls unsafe, will warrant relief by injunction.<sup>79</sup> If, however, the injury to plaintiff's building from operating machinery by steam power upon adjacent premises affects only the rental value of plaintiff's property and can be adequately compensated in damages, equity will decline to interfere by injunction; especially when the business complained of is not a nuisance *per se*, and when plaintiff has acquiesced therein for many years.<sup>80</sup> And when the alleged nuisance consists in the operation of steam printing presses in a city, but the proof is conflicting as to the effect of such operation, it is not error to refuse an interlocutory injunction which would greatly damage defendant by preventing him from continuing his business.<sup>81</sup> And where it appears that plaintiff, who is seeking to enjoin the operation of heavy steam machinery, is himself conducting a business which is at times harmful to the neighborhood and which frequently results in the pollution of the atmosphere, while this circumstance is not sufficient to justify a nuisance, it may nevertheless deter the court where plaintiff's right is doubtful.<sup>82</sup>

§ 782. **Houses of ill-fame.** The general principles of equity with regard to nuisances and their restraint apply to houses

<sup>79</sup> *Dittman v. Repp*, 50 Md., 516; that an injunction should be granted.

*Shelfer v. City of London E. L. Co.*, 64 L. J. N. S. Ch., 216; *Demarest v. Hardham*, 34 N. J. Eq., 469. In the latter case it was ordered that the defendant should so change the position of his machinery as to prevent the vibration, or, in default of so doing,

<sup>80</sup> *Goodall v. Crofton*, 33 Ohio St., 271.

<sup>81</sup> *McCaffrey's Appeal*, 105 Pa. St., 253.

<sup>82</sup> *Straus v. Barnett*, 140 Pa. St., 111, 21 Atl., 253.



of ill-fame, and the continuance of such houses may be restrained upon a bill filed by private persons, alleging that the close proximity of such nuisance to their private residence deprives them of the comfortable enjoyment of their property and greatly diminishes its value.<sup>83</sup> Nor does it constitute a defense to the granting of the relief in such case that the acts complained of are crimes and as such may be punished under the criminal laws of the state.<sup>84</sup> Nor is it a defense that the plaintiff does not himself reside upon the premises but rents them out to tenants.<sup>85</sup> So the owner of dwelling houses, who, with full knowledge of such use, rents them to be used as houses of prostitution, may be enjoined from renting them for such purposes.<sup>86</sup> But to entitle the plaintiff to relief, he must make distinct and positive averments and allegations sufficient to show that the acts complained of in fact amount to a nuisance.<sup>87</sup>

§ 783. **Party-walls; roofs.** In the case of adjacent lot owners between whom there is a party-wall, equity may enjoin one of such owners from maintaining his roof in such manner and of such construction that water, snow and ice therefrom fall upon the roof of the adjacent owner, to its great damage and causing serious danger.<sup>88</sup> But in conformity with the maxim that he who would have equity must do equity, it is held that where one seeks to restrain an ad-

<sup>83</sup> *Hamilton v. Whitridge*, 11 Md., 128; *Cranford v. Tyrrell*, 128 N. Y., 341, 28 N. E. 514; *Weakley v. Page*, 102 Tenn., 178, 53 S. W., 551, 46 L. R. A., 552; *Blagen v. Smith*, 34 Ore., 394, 56 Pac., 292, 44 L. R. A., 522.

<sup>84</sup> *Cranford v. Tyrrell*, 128 N. Y., 341, 28 N. E., 514. And see, *ante*, § 20a. But see, *contra*, *Neaf v. Palmer*, 103 Ky., 496, 45 S. W., 506, 41 L. R. A., 219, where, although it appeared clearly that the main-

tenance of the house would depreciate the value of property in the vicinity and that it was obnoxious to the neighborhood, the relief was denied on the ground that the nuisance was a crime.

<sup>85</sup> *Weakley v. Page*, 102 Tenn., 178, 53 S. W., 551, 46 L. R. A., 552.

<sup>86</sup> *Marsan v. French*, 61 Tex., 173.

<sup>87</sup> *Redway v. Moore*, 3 Idaho, 312, 29 Pac., 104.

<sup>88</sup> *Brooks v. Curtis*, 4 Lans., 283.

jaacent lot owner from using his wall as a party-wall, but plaintiff's wall projects over upon defendant's lot, plaintiff can have relief only upon condition of removing so much of his wall as projects upon defendant's premises.<sup>89</sup>

§ 784. **Offensive noise and odors; powers of board of health.** The handling of old iron so near to plaintiff's dwelling as to cause great noise injurious to the health and comfort of plaintiff's family, and the drying of old rags and sheepskins upon the roof of defendant's premises in the vicinity of plaintiff's, thereby emitting unwholesome and unhealthful odors, would seem to be sufficient ground for an injunction. And where in an action, under the procedure of the state, to recover damages for such a nuisance as well as for an injunction, the court directs all the issues to be tried by a jury and the jury find a verdict for plaintiff, with damages, it is held that the verdict necessarily finds that defendants have committed the acts charged as a nuisance, and therefore entitles plaintiff to an injunction.<sup>90</sup> And a municipal board of health, which is authorized to prohibit the exercise of any offensive trade or employment within a city, having declared a particular trade to be a nuisance and prohibited its exercise, may maintain an action to restrain the prosecution of such trade.<sup>91</sup>

§ 785. **Annoyance from school house.** It is, however, important to bear in mind that the mere fact of a depreciation in the value of plaintiff's property, by the act which he seeks to restrain as a nuisance, will not warrant a court of equity in granting an injunction unless the act complained of is a nuisance in law. Where, therefore, it is sought to enjoin the erection of a school house upon premises adjoining those of plaintiff, the relief will not be allowed merely upon the ground that such erection will depreciate the value of

<sup>89</sup> *Guttenberger v. Woods*, 51 Cal., reversing S. C., 1 *Thomp. & C.*, 590. 523.

<sup>91</sup> *City of Taunton v. Taylor*, 116

<sup>90</sup> *Parker v. Laney*, 58 N. Y., 469, Mass., 254.

plaintiff's property and cause him some annoyance and inconvenience.<sup>92</sup>

§ 786. **Effect of plaintiff's laches.** He who seeks relief against a nuisance must show due diligence in the assertion of his rights, and where complainant has been guilty of great laches, or has allowed defendant for a long period to continue in the erection of his obnoxious structure at great expense and without molestation, equity will not interfere.<sup>93</sup> Even where the cause of complaint has been temporarily removed and is about to be renewed, complainants, who have long slept on their rights, will not be allowed to enjoin it as a renewal of the nuisance, and thus put themselves in the position from which their own laches has debarred them.<sup>94</sup> Especially will plaintiff's laches be a bar to relief where the granting of the injunction would result in great injury and inconvenience to the public with little corresponding benefit to the plaintiff.<sup>95</sup> It is difficult to fix any precise period of delay as fatal to complainant's right to relief against the nuisance, but where defendant has for more than twenty years carried on his trade without molestation, and proves a good *prima facie* title by prescription, equity will not interfere, but will leave the parties to seek their remedy at law.<sup>96</sup> And it has frequently been decided that where the

<sup>92</sup> *Harrison v. Good*, L. R. 11 Eq., 338.

<sup>93</sup> *Parker v. Winnipiseogee L. C. & W. Co.*, 2 Black, 545; *Tichenor v. Wilson*, 4 Halst. Ch., 197; *Dana v. Valentine*, 5 Met., 8; *Weller v. Smeaton*, 1 Cox, 102; *Reid v. Gifford*, 6 Johns. Ch., 19; *Southard v. Morris C. & B. K. Co.*, Saxt., 518; *Johnson v. Wyatt*, 2 DeGex, J. & S., 17. See also *Louisville Coffin Co. v. Warren*, 78 Ky., 400; *Herr v. Central Ky. Asylum*, 110 Ky., 282, 61 S. W., 283; *Tuttle v. Church*, 53 Fed., 422.

<sup>94</sup> *Southard v. Morris C. & B. K.*

*Co.*, Saxt., 518. Defendants at great expense had erected a dam and works, which had continued for several years without molestation from complainant. The water having been temporarily drawn off and defendants being about to raise it to its former height, complainant sought an injunction to prevent them from so doing. The relief was refused upon the principles stated in the text.

<sup>95</sup> *Herr v. Central Ky. Asylum*, 110 Ky., 282, 61 S. W., 283.

<sup>96</sup> *Dana v. Valentine*, 5 Met., 8.

works complained of had been allowed to stand three years and upward, it was such laches as would prevent relief in equity.<sup>97</sup> But it is held that no acquiescence short of twenty years adverse user will bar plaintiff from his right to relief by injunction against a nuisance, unless he is estopped by some act or conduct which has induced defendant to incur expense, or to take action upon the strength of such conduct.<sup>98</sup>

§ 787. **Cautious interference with mills.** Great caution is exercised in interfering with establishments and erections which tend to promote public convenience, as in the case of mills, and in such cases it will not suffice to show a probable or contingent injury, but it must be shown to be inevitable and undoubted.<sup>1</sup> And where a statute provides ample remedy at law for the damages incurred, the injunction will not be allowed.<sup>2</sup> And a flouring and corn mill in a city is not a nuisance *per se*, which will be enjoined as such by a court of equity. Indeed, it may be affirmed as a general rule applicable to cases of this nature, that equity will not enjoin the lawful use of such property in a city, when by the proper application of scientific appliances and machinery the evils complained of may be remedied; and in such case, the court will go no further than to require such appliances to be used.<sup>3</sup> Nor will a court of equity, at the suit of an adjacent proprietor occupying the upper portion of his building as a residence, enjoin the operation by defendants of a steam flouring mill in a business locality in a city, when the mill is carefully constructed to avoid injury to others and is operated in a proper manner, even though considerable in-

<sup>97</sup> *Weller v. Smeaton*, 1 Cox, 102; 199; *Attorney-General v. Perkins*, *Reid v. Gifford*, 6 Johns. Ch., 19; 2 Dev. Eq., 38. See also *Owen v. Tichenor v. Wilson*, 4 Halst. Ch., Phillips, 73 Ind., 284.

197. <sup>2</sup> *Barnes v. Calhoun*, 2 Ired. Eq.,

<sup>98</sup> *Campbell v. Seaman*, 63 N. Y., 199.

568; S. C., 2 Thomp. & C., 231.

<sup>3</sup> *Green v. Lake*, 54 Miss., 540.

<sup>1</sup> *Barnes v. Calhoun*, 2 Ired. Eq.,

convenience and annoyance should result to plaintiff by its operation. In such a case, the court will have due regard to the general interests of the public, and such minor inconveniences as result to the citizen will be left to be redressed by an action for damages rather than by the more severe remedy of injunction.<sup>4</sup> Upon the same principles, an injunction will not be granted against the operation of an electric lighting plant which furnishes light to the inhabitants of a city, because of noise, smoke and vibration, where defendant has made alterations in the plant to diminish the evils complained of which leave it a matter of doubt whether plaintiff is suffering any substantial injury or discomfort greater than that which is usually incident to city life, especially where the granting of the writ would result in great inconvenience to the public by depriving them of lights.<sup>5</sup>

§ 788. **Planing mill; increased risk of fire; manufacturing inflammable material.** When the business proposed is lawful in itself, as in the erection of a planing mill, and the testimony is conflicting as to whether its operation will prove a nuisance, equity will not interfere, the question of nuisance being doubtful.<sup>6</sup> And the fact that a planing mill would injure plaintiff's business, or injure the reputation of his house as a boarding-house and make it less desirable for that purpose, thereby lessening his profits, will not warrant an injunction when it is not shown that the operation of such mill would be a nuisance.<sup>7</sup> But a bill alleging that a planing mill is to be located in a residence portion of a city in close proximity to plaintiff's dwelling and that its operation will cause a great amount of steam, dust, dirt, smoke and noise, which will penetrate into plaintiff's house, making it necessary to keep the windows closed and render-

<sup>4</sup> *Gilbert v. Showerman*, 23 Mich., 448. See *Owen v. Phillips*, 73 Ind., 284.

<sup>6</sup> *Duncan v. Hayes*, 7 C. E. Green, 25; *Dorsey v. Allen*, 85 N. C., 353.

<sup>7</sup> *Duncan v. Hayes*, 7 C. E. Green,

<sup>5</sup> *English v. Progress E. L. & M. Co.*, 95 Ala., 259, 10 So., 134.



ing it unfit for habitation, has been held good on demurrer.<sup>8</sup> But the increased risk of fire resulting from defendant's structure and the consequent larger rates of insurance will not of themselves warrant relief by injunction.<sup>9</sup> So when the bill sought to restrain the erection of a manufactory for the making of felt roofing, upon the ground that the dirt, smoke and appurtenances of the factory, with the inflammable nature of the materials used in the process of manufacturing such roofing, would impair health and destroy the character of plaintiff's property for dwelling purposes, and that irreparable and continuing injury would result to plaintiffs from the carrying on of such business, it was held that the facts constituting the alleged injury were not sufficiently stated to justify an injunction in the first instance.<sup>10</sup>

§ 789. **Effect on use or value of surrounding property; jail not enjoined.** It is no ground for interference that the erection of the alleged nuisance would prevent the use of surrounding property for such buildings as, in the ordinary course of affairs and the extension of a city, would be erected.<sup>11</sup> So equity will not interfere in behalf of the owners of vacant lots, to enjoin the carrying on of a soap factory, on the ground that it prevents the lots from being built upon and diminishes their value, since the proper remedy is by an action at law to recover damages for the diminished value of the property.<sup>12</sup> And the erection of a jail being a matter of public necessity and not a nuisance *per se*, it will not be enjoined upon the ground that it might cause annoyance or inconvenience to a property owner residing in its immediate vicinity.<sup>13</sup>

<sup>8</sup> Rogers v. Week Lumber Co., 117 Wis., 5, 93 N. W., 821.

<sup>10</sup> Adams v. Michael, 38 Md., 123.

<sup>9</sup> Duncan v. Hayes, 7 C. E. Green, 274.

<sup>11</sup> Rhodes v. Dunbar, 57 Pa. St.,

25; Rhodes v. Dunbar, 57 Pa. St., 274; Chambers v. Cramer, 49 West Va., 395, 38 S. E., 691, 54 L. R. A.,

<sup>12</sup> Dana v. Valentine, 5 Met., 8.

545.

<sup>13</sup> Burwell v. Commissioners, 93 N. C., 73.

§ 790. **Grounds of dissolution.** The fact that the answer, while admitting the material facts charged in the bill, denies the conclusion that the erection would be a nuisance, will not warrant a dissolution of the injunction.<sup>14</sup> But if upon the bill and answer it does not appear that the structure complained of is *prima facie* a nuisance, the injunction will be dissolved, the defendant, however, proceeding at his peril in the erection.<sup>15</sup> Nor will an injunction be continued against the erection of a structure where the facts do not satisfactorily show a probability of irreparable injury to complainants, or that it would endanger their lives or health, or prove materially injurious to their comfort.<sup>16</sup>

§ 791. **Irreparable injury; mill near railroad track.** Relief by injunction is sometimes granted where damages for the commission of the nuisance would be difficult of adjustment pecuniarily, thus rendering the remedy at law ineffectual. Upon this ground the erection of a mill so near a railway track as not to leave room for repairing the track has been enjoined as a nuisance.<sup>17</sup> And it is held that a bill to enjoin the erection of a nuisance in close proximity to complainant's buildings, which contains allegations of irreparable injury to complainant, is not demurrable for want of equity, nor as stating a case in which the sole remedy is at law, nor because it fails to show that the rights of the parties have been settled at law.<sup>18</sup>

§ 792. **Changing character of premises; windows in party-wall; mandatory injunction.** Lessees of a building who have

<sup>14</sup> Coker v. Birge, 9 Ga., 425.

<sup>15</sup> Mygatt v. Goetchins, 20 Ga., 350; Cunningham v. Rice, 28 Ga., 30.

<sup>16</sup> Thebaut v. Canova, 11 Fla., 143.

<sup>17</sup> Cunningham v. Rome R. Co., 27 Ga., 499.

<sup>18</sup> Aldrich v. Howard, 7 R. I., 87.

And in Porter v. Witham, 17 Maine, 292, it is held that, unless complainant's right has been established at law, he must show a long and uninterrupted user to warrant the interposition of equity. But the weight of authority would seem to be against this position.

rented upon representations to the lessor that they desired the building for a private dwelling may be enjoined from altering it in such manner as to carry on the business of coach making, the house being in danger of falling from the alterations.<sup>19</sup> And the converting of old houses in a large city to purposes which render them dangerous to the public may be enjoined as a nuisance.<sup>20</sup> So where party-walls are required by law to be of solid brick or stone, without openings, the erection by a lot owner of a party-wall containing windows constitutes such a nuisance as comes within the restraining powers of equity, and it will be enjoined.<sup>21</sup> And in a case of nuisance to a dwelling house, the injunction will be made mandatory if the circumstances of the case require it.<sup>22</sup>

§ 792 *a*. **Burial ground, when not enjoined; proof of injury must be clear.** A burial ground is not such a nuisance *per se* as to entitle land owners in its vicinity to enjoin its continuance. And unless such special circumstances are shown as to satisfy the court that the continued use of the premises for burial will result in special injury to plaintiff, irreparable by the ordinary remedies at law, equity will not interfere.<sup>23</sup> And to warrant an injunction against the continuance of a burial ground general averments of injury will not suffice, but facts and circumstances must be distinctly averred from which the court may plainly see that, unless the relief is granted, there will be a diminution of plaintiff's enjoyment of his premises and probable injury to the health

<sup>19</sup> *Bonnett v. Sadler*, 14 Ves., 526.

<sup>20</sup> *Mayor v. Bolt*, 5 Ves., 129. In this case certain old houses in London were about to be pulled down in making improvements in the city, and defendant had stored in them large quantities of sugar, so that two of the houses had actually fallen and others were in great danger. Defendant was enjoined

from further using the buildings as storehouses.

<sup>21</sup> *Vollmer's Appeal*, 61 Pa. St., 118.

<sup>22</sup> *Hervey v. Smith*, 1 Kay & J., 392. See also *Gale v. Abbott*, 8 Jur. N. S., 987.

<sup>23</sup> *Kingsbury v. Flowers*, 65 Ala., 479; *Dunn v. City of Austin*, 77 Tex., 139, 11 S. W., 1125.

of his family.<sup>24</sup> And to warrant relief in such cases, proof of the injury complained of must be clear, especially where the granting of the injunction would work great public inconvenience. Where, therefore, there is no proof of any substantial injury to the plaintiff and it appears doubtful whether any will ever occur, the injunction should be denied.<sup>25</sup> But where it clearly appears that the maintenance of a burial ground in the vicinity of the plaintiff's dwelling will result in injury to life and health either by corrupting the surrounding atmosphere or the water of wells and springs, relief by injunction may be granted owing to the inadequacy of the legal remedy.<sup>26</sup> And where a statute grants municipal authorities power to acquire land for cemetery purposes but provides that land shall not be appropriated for that purpose within two hundred yards of any dwelling, the establishment of a burial ground at a less distance than that prescribed may be enjoined.<sup>27</sup>

§ 793. **Joinder of parties, plaintiff and defendant.** Upon the question of the joinder of plaintiffs in an action to restrain a nuisance to dwellings, the authorities are not uniform. In this country it has been held that separate owners of distinct property interests which are injuriously affected by the same nuisance may join in maintaining a bill for an injunction.<sup>28</sup> Under the English chancery practice, however, a different rule seems to have prevailed. And when different persons joined in the action, each having a separate tenement, the bill praying an injunction against the erection of

<sup>24</sup> *Kingsbury v. Flowers*, 65 Ala., 479; *Dunn v. City of Austin*, 77 Tex., 139, 11 S. W., 1125. See also *Upjohn v. Board of Health*, 46 Mich., 542, 9 N. W., 845.

<sup>25</sup> *Wahl v. M. E. Cemetery Assn.*, 197 Pa. St., 197, 46 Atl., 913.

<sup>26</sup> *Clark v. Lawrence*, 6 Jones Eq. (N. C.), 83, 78 Am. Dec., 241;

*Lowe v. Prospect H. C. Assn.*, 58 Neb., 94, 78 N. W., 488, 46 L. R. A., 237.

<sup>27</sup> *Henry v. Trustees*, 48 Ohio St., 671, 30 N. E., 1122.

<sup>28</sup> *Robinson v. Baugh*, 31 Mich., 290; *Bushnell v. Robeson*, 62 Iowa, 540, 17 N. W., 888. And see *Jung v. Neraz*, 71 Tex., 396, 9 S. W., 344.

a nuisance in the neighborhood of their premises, the relief was denied, upon the ground that, as each of the plaintiffs had a separate nuisance to complain of, that which would be an answer to one would not be an answer to the others.<sup>29</sup> But as regards the defendants to the action, it is held that when the owner of the premises grants a license to another person to do an act upon the premises which amounts to a nuisance, such as the burning of brick, the injunction may go against the owner as well as against the person actually committing the nuisance.<sup>30</sup>

<sup>29</sup> *Hudson v. Maddison*, 12 Sim., 416.

<sup>30</sup> *White v. Jameson*, L. R. 18 Eq., 303.



## IV. NUISANCES TO WATER.

- § 794. Foundation of the jurisdiction.
- 795. When relief granted.
- 796. Plaintiff's right should be established; diversion of water from mills.
- 797. Plaintiff's delay and acquiescence.
- 798. Right to relief extends to quality as well as quantity of water; when relief denied.
- 799. Right by prescription.
- 800. Limitations upon doctrine of adverse enjoyment.
- 801. Subterranean streams; cemetery; digging well.
- 802. Construction of levee enjoined.
- 803. Improvements in navigable streams; suit by United States; court need only have jurisdiction of person.
- 804. Mandatory injunction.
- 805. Discharge from mine.
- 806. When relief allowed between tenants in common.
- 807. Waste of water supplying mill.
- 808. Restrictions upon the relief.
- 809. Questions of surface water.
- 810. Pollution of streams by sewage.
- 811. The same.
- 812. Navigable rivers; erection of wharves; obstructions.
- 813. Riparian owners allowed relief.
- 814. Logs and booms; obstruction by railway.
- 815. Regatta upon lake; pollution of fish ponds.
- 815a. Raising or lowering of lake level.

§ 794. **Foundation of the jurisdiction.** The interference of equity by the writ of injunction is frequently invoked to restrain nuisances to water and the infringement of riparian rights. As an incident to the ownership of the adjacent soil, a riparian proprietor has an interest of a usufructuary nature in the water flowing past his land, which equity will protect. This right or interest being common to all owners of land adjacent to a stream, no proprietor can, in the absence of a right to exclusive enjoyment, use the water in such manner as to injure adjoining proprietors. Nor can he, unless authorized by adjacent owners, divert the water from its natural course, to the injury of the owner below, or

change its quality, or diminish its quantity, or cause it to flow back upon the proprietor above.<sup>1</sup> And the test to be applied in such cases is whether the use of the water is such as to cause a substantial injury to other proprietors in their common right.<sup>2</sup> The jurisdiction of equity in this class of cases may be regarded as ancient and well established. It is founded upon the pressing necessity of immediate relief being granted where, in the absence of such relief, permanent mischief and lasting injury might result,<sup>3</sup> and also rests upon the necessity of preventing multiplicity of suits.<sup>4</sup> And the right being established, together with the wrongful interruption of that right tending to the great injury of the person aggrieved, equity will interfere.<sup>5</sup> And while an injunction will not ordinarily be granted unless positive and substantial injury be shown, yet where adverse rights are likely to arise, it may be allowed, even though the injury is trivial, to the extent of vindicating the plaintiff's rights and of preventing their loss by adverse user or lapse of time.<sup>6</sup>

§ 795. **When relief granted.** Where the extent of the injuries resulting from the invasion of the right is difficult of estimation, an injunction is regarded as the most efficient remedy.<sup>7</sup> And riparian proprietors, owning to the center of a

<sup>1</sup> *Webb v. Portland Mfg. Co.*, 3 Sumner, 189; *Bealey v. Shaw*, 6 East, 208; *Mason v. Hill*, 5 B. & A., 1; *McCormick v. Horan*, 81 N. Y., 86; *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 576, 37 Pac., 297, 26 L. R. A. 425; *Roberts v. Gwyrfaï District Council*, (1899) 2 Ch., 608; *Saunders v. Bluefield W. Co.*, 58 Fed., 133.

<sup>2</sup> *Tyler v. Wilkinson*, 4 Mason, 397. See also *Weiss v. Oregon I. & S. Co.*, 13 Ore., 496, 11 Pac., 255.

<sup>3</sup> *Gardner v. Newburgh*, 2 Johns. Ch., 162, and cases cited.

<sup>4</sup> *Lyon v. McLaughlin*, 32 Vt., 423.

<sup>5</sup> *Gardner v. Newburgh*, 2 Johns. Ch., 162, and cases cited; *McCormick v. Horan*, 81 N. Y., 86.

<sup>6</sup> *Ulbricht v. Eufaula Water Co.*, 86 Ala., 587, 6 So., 78, 4 L. R. A., 572, 11 Am. St. Rep., 72; *dictum* in *Franklin v. Pollard Mill Co.*, 88 Ala., 318, 6 So., 685.

<sup>7</sup> *Lyon v. McLaughlin*, 32 Vt., 423. The court say: "Where the invasion of a right of this kind of property is threatened and intended, which is necessarily to be

stream, are entitled to the aid of equity to prevent a diversion of the waters from their natural channel. Nor does the neglect of complainants to use or appropriate the water-power, or the fact that they have, as yet, sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.<sup>8</sup> And where one owns land on both sides of a stream not navigable, and never declared a public highway, he is entitled to an injunction to restrain the floating of logs down his stream to the injury of his premises.<sup>9</sup> And where, in such case, different parties assert the same right to the use of the stream, they may be joined as defendants in the same action.<sup>10</sup> But the floating of logs down a navigable river, which has been allowed under color of legislative authority for many years, will not be enjoined as a nuisance at the suit of a steamboat proprietor navigating the river, plaintiff's right not having been established at law and there having been long acquiescence in the action of defendant.<sup>11</sup>

§ 796. **Plaintiff's right should be established; diversion of water from mills.** In general it must be made to appear that complainant's right to enjoy the land has been satisfactorily established at law.<sup>12</sup> And where this does not appear, and

continuing and operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords, in fact, the only adequate and sure remedy. The very doubtfulness as to the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation render such an injury irreparable in the

sense of the law relating to this subject."

<sup>8</sup> *Corning v. Troy Factory*, 40 N. Y., 191, affirming S. C., 34 Barb., 485, 39 Barb., 311; *Tuolumne Water Co. v. Chapman*, 8 Cal., 392; *Weiss v. Oregon I. & S. Co.*, 13 Ore., 496, 11 Pac., 255.

<sup>9</sup> *Curtis v. Keesler*, 14 Barb., 511.

<sup>10</sup> *Meyer v. Phillips*, 97 N. Y., 485.

<sup>11</sup> *Herrman v. Beef Slough M. Co.*, 1 Fed., 145.

<sup>12</sup> *Coe v. Winnipiseogee Co.*, 37 N. H., 255; *Weller v. Smeaton*, 1

it is not alleged that there is danger of irreparable mischief or of injury not susceptible of compensation in a suit at law, the bill is obnoxious to a demurrer for want of equity.<sup>13</sup> A diversion of water from complainant's mills, where valuable and extensive machinery is being used and employment furnished to a large number of men, constitutes a sufficient ground for an injunction.<sup>14</sup> But the construction of an artificial channel which merely has the effect of giving more direct course to water which had from time immemorial drained off through a natural outlet, will not be enjoined, the volume of water not being increased.<sup>15</sup> Nor will the diversion of water be enjoined at the suit of one mill owner against others when it is not shown that the injury is of a permanent or irreparable nature.<sup>16</sup> And a court of equity will not *in limine* and before a determination of the legal right restrain an upper proprietor from diverting water from a non-navigable stream when no injury has yet been sustained and the question of injury is conjectural, and when the granting of an injunction would result in irreparable injury to the defendant.<sup>17</sup>

§ 797. **Plaintiff's delay and acquiescence.** While a court of equity may interfere for the protection of the legal right to the use of water in a stream which is being fouled, and whose value is being impaired for manufacturing purposes, by defendant's works farther up the stream, yet if com-

Cox, 102; Meyer v. Phillips, 97 N. Y., 485. See also Burnham v. Kempton, 44 N. H., 78. But see, *contra*, Corning v. Troy Factory, 40 N. Y., 191, affirming S. C., 34 Barb., 485, 39 Barb., 311; Morris v. Central, 1 C. E. Green, 419; Buchanan v. Grand River Co., 48 Mich., 364, 12 N. W., 490.

<sup>13</sup> Coe v. Winnipiseogee Co., 37 N. H., 255. But it is held that complainant need not first establish his

title at law where the averments of his rights are admitted by demurrer. Tuolumne Water Co. v. Chapman, 8 Cal., 302.

<sup>14</sup> Wright v. Moore, 38 Ala., 593.

<sup>15</sup> Potier's Executors v. Burden, 38 Ala., 651.

<sup>16</sup> Westbrook M. Co. v. Warren, 77 Me., 437, 1 Atl., 246; Haskell v. Thurston, 80 Me., 129, 13 Atl., 273.

<sup>17</sup> Walton v. Mills, 86 N. C., 280.

plainants have not used due diligence in the assertion of their rights, and have for a long period allowed defendants to erect and operate their works without objection, an injunction will be refused, especially when the injury complained of can be compensated in damages at law, and when the granting of the relief would inflict serious injury upon defendants, without doing any practical good to complainants.<sup>18</sup>

§ 798. **Right to relief extends to quality as well as quantity of water; when relief denied.** The right of the owner of the realty through which a stream of water flows to the uninterrupted use and enjoyment of the stream, extends to the quality as well as to the quantity of the water.<sup>19</sup> Hence any use of the water which operates to destroy health or to diminish the comfort of a riparian owner will be enjoined as a constantly recurring injury, irreparable in its nature and not susceptible of adequate compensation in damages.<sup>20</sup> And a court of equity will enjoin the fouling of a stream in such manner as to be injurious to the owner of dye-works, situated further down the stream, by rendering the water unfit for dyeing purposes.<sup>21</sup> So the owner of pulp works situated upon the banks of a stream of clean water may enjoin the owner of a morocco factory from discharging the refuse of the factory into the stream, thereby polluting the water and rendering it unfit for plaintiff's use.<sup>22</sup> So the depositing of saw dust and other debris from saw mills to such an extent as to interfere seriously with and impair the opera-

<sup>18</sup> *Wood v. Sutcliffe*, 2 Sim. N. S., 163.

<sup>19</sup> *Bealey v. Shaw*, 6 East, 208. See *Davis v. Lambertson*, 56 Barb., 480.

<sup>20</sup> *Holsman v. Boiling Spring Bleaching Co.*, 1 McCart., 335; *Lewis v. Stein*, 16 Ala., 214; *Mayor v. Warren M. Co.*, 59 Md., 96; *Mid-*

*dlestadt v. W. S. & P. Co.*, 93 Wis., 1, 66 N. W., 713; *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed., 970; S. C., on final hearing, 57 Fed., 1000.

<sup>21</sup> *Clowes v. Staffordshire Co.*, L. R. 8 Ch., 125.

<sup>22</sup> *Jessup & Moore Paper Co. v. Ford*, 6 Del. Ch., 52, 33 Atl., 618.



tion of plaintiff's mills situated below and upon the same stream, thereby causing a constant and irreparable injury, may be enjoined.<sup>23</sup> And it is proper, in such case, to join as defendants several mill owners the refuse from whose different mills commingles, it being impossible to determine the extent to which each mill contributes to the nuisance.<sup>24</sup> And the pollution of a running stream used for domestic purposes, the watering of cattle and the cutting of ice, by the underdraining of a cemetery, may be enjoined, the relief being granted even though the water has, to a certain extent, been rendered unwholesome by the washings of manured lands in the vicinity.<sup>25</sup> So the lower riparian owner who uses the water of a stream for live stock purposes may enjoin the defendant from polluting the water and injuring the flow by discharging into it the manure and offal from extensive cattle feeding barns in such manner as to injure the stream for husbandry.<sup>26</sup> So the existence of privies and hog-pens, from which filth and excrement are discharged into a stream from which the supply of water for a city is obtained, affords sufficient ground for an injunction. But upon a bill by one riparian owner to enjoin the pollution of a stream by another, the burden of proof as to the fact of nuisance rests upon plaintiff, and unless the existence of the nuisance is satisfactorily shown an injunction will not be granted in the first instance.<sup>27</sup> So when plaintiff fails to show that he has yet sustained any actual injury or pollution of the water to which he is entitled, and when by the use of due care on the part of defendant all injury may be prevented,

<sup>23</sup> *Lockwood Co. v. Lawrence*, 77 Me., 297; *Cemetery Assn.*, 159 Ill., 385, 42 N. E., 891, 31 L. R. A., 109, 50 Am. St. Rep., 168.

<sup>24</sup> *Lockwood Co. v. Lawrence*, 77 Me., 297. And see this case as to the right of defendants by prescription in such case.

<sup>25</sup> *Barton v. Union C. Co.*, 28 Neb., 350, 44 N. W., 454, 7 L. R. A., 457, 26 Am. St. Rep., 340.

<sup>27</sup> *Mayor v. Warren M. Co.*, 59-

<sup>25</sup> *Barrett v. Mt. Greenwood* Md., 96.

an injunction may be refused, without prejudice to the bringing of another action in the future.<sup>28</sup> And it is to be observed that past injuries afford no ground for the relief, and where it does not certainly appear that the diversion of the water will be repeated, or that there is danger of its being repeated, to the injury of complainant, the injunction will not be allowed.<sup>29</sup> And it is held that an injunction will not lie against a defendant who sinks an artesian well upon his premises and uses the water for the purpose of bathing the patients in a sanitarium and hospital located upon his land, to restrain him from allowing the water thus used to flow into a stream which is the natural watercourse of the basin in which the well is situated, it appearing that the defendant is free from negligence or malice and is using all due care to avoid injury to his neighbor.<sup>30</sup>

§ 799. **Right by prescription.** Adverse possession and exercise of the right of diverting the water for twenty years is sufficient to raise a presumption of a grant, and to defeat complainant's right to an injunction against a private nuisance.<sup>31</sup> And this upon the principle that as twenty years' possession gives rise to a presumption of a grant, so a non-user for that length of time will put an end to the presumption.<sup>32</sup> But the extent of the prescriptive right must be limited by the actual enjoyment, and must be commensurate

<sup>28</sup> *Fletcher v. Bealey*, 28 Ch. D., 58; *Holsman v. Boiling Spring Bleaching Co.*, 1 McCart., 335; 688.

<sup>29</sup> *Society v. Morris Canal & Banking Co.*, Saxt., 157; *Potier's Executors v. Burden*, 38 Ala., 651; *Cobb v. Smith*, 16 Wis., 661.

<sup>30</sup> *Barnard v. Sherley*, 135 Ind., 547, 34 N. E., 600, 35 N. E., 117, 24 L. R. A., 568, 41 Am. St. Rep., 454.

<sup>32</sup> *Shields v. Arndt*, 3 Green Ch.,

<sup>31</sup> *Shields v. Arndt*, 3 Green Ch., 234; *Coalter v. Hunter*, 4 Rand.,

with that enjoyment.<sup>33</sup> And to bring a case within the rule, the possession of the one must be so inconsistent with the rights of the other as to amount to an actual ouster.<sup>34</sup> Upon the other hand, the right of the riparian owner to protection may itself arise from prescription. Thus, where a change is made in the natural flow of a water course, as by a canal company in erecting embankments and structures which protect the land of riparian owners from overflow, and this use of the stream is acquiesced in for so long a period as to give a right by prescription or limitation, a riparian owner may enjoin the removal of such structures which would cause the water to overflow his land.<sup>35</sup>

§ 800. **Limitations upon doctrine of adverse enjoyment.** The person gaining a right to the use of water by adverse enjoyment for the required period is entitled to what he has enjoyed during that period, and to no more.<sup>36</sup> Thus, if he has exercised the right to use the water upon certain days of the week or in certain quantities, he can not use it upon other days or in different quantities.<sup>37</sup> And the user must clearly appear to have been adverse to the right of the other owner, and where the use of the water was originally granted as a loan without consideration, and was afterward continued as a loan, equity will withhold its aid.<sup>38</sup> And the owner of an upper tract of land, who has for more than five years enjoyed the undisturbed privilege of flowing the waste water used from artificial sources for irrigating his premises, does not thereby acquire an easement to flow the water over lower lands to such an extent as to seriously injure them, and may be enjoined from so doing.<sup>39</sup>

<sup>33</sup> *Holsman v. Boiling Spring* *Davies v. Williams*, 16 Q. B., 546. *Bleaching Co.*, 1 McCart., 335. <sup>37</sup> *Strutt v. Bovingdon*, 5 Esp., 56; *Brown v. Best*, 1 Wils., 174.

<sup>34</sup> *Pratt v. Lamson*, 2 Allen, 275. <sup>38</sup> *Coalter v. Hunter*, 4 Rand., 58.

<sup>35</sup> *Burk v. Simonson*, 104 Ind., 173, 2 N. E., 369, 3 N. E., 826. <sup>39</sup> *Blaisdel v. Stephens* 14 Nev.,

<sup>36</sup> *Bealey v. Shaw*, 6 East, 208; 17.

§ 801. **Subterranean streams; cemetery; digging well.** Since it is impossible to establish correlative rights in subterranean streams, the situation of which is not known, an injunction will not be granted against the construction of a cemetery, on the ground that the drainage from the subterranean streams would destroy the use of complainant's spring and greatly injure his land.<sup>40</sup> And the digging of a well on one's own premises, the result of which is to dry up a spring upon adjoining premises, does not warrant a court of equity in interfering, there being no apparent or visible connection between the well and the spring, and the water merely percolating into defendant's land.<sup>41</sup>

§ 802. **Construction of levee enjoined.** The construction of a levee may be enjoined where its effect would be to obstruct the drainage of water from complainant's land, and, by causing its overflow, prove injurious to health. And in such case the relief may also be granted where complainant's rights have not been concluded by payment of just compensation for the loss or injury, the damage promising to be irreparable, and the jurisdiction is regarded as inherent in the powers of a court of chancery.<sup>42</sup>

§ 803. **Improvements in navigable streams; suit by United States; court need only have jurisdiction of person.** A bill will lie in behalf of the United States for an injunction to protect improvements, which are being made by authority of Congress in navigable waters, from injury by works carried on under authority of a state.<sup>43</sup> And the United States has such a property right in the navigable rivers of the country as will enable it to maintain a bill to restrain the unlawful obstruction of such waters.<sup>44</sup> But where the injury appre-

<sup>40</sup> *Greencastle v. Hazelett*, 23 Ind., 186.

<sup>43</sup> *United States v. Duluth*, 1 Dill., 469.

<sup>41</sup> *Mosier v. Caldwell*, 7 Nev., 363; *Trustees v. Youmans*, 45 N. Y., 362, affirming *S. C.*, 50 Barb., 316.

<sup>44</sup> *North Bloomfield G. M. Co. v. United States*, 32 C. C. A., 84, 88 Fed., 664.

<sup>42</sup> *Martin, Ex parte*, 13 Ark., 198.

hended from an alteration in a navigable stream by agents of the government is mere matter of opinion, and is denied by defendant, the injunction will be refused.<sup>45</sup> It is also to be observed that the remedy by injunction being primarily *in personam*, a nuisance consisting of an injury to water rights may be enjoined in the state which has jurisdiction of the person committing the injury, regardless of the *locus* of the nuisance itself.<sup>46</sup>

§ 804. **Mandatory injunction.** Although a court of equity will not grant a mandatory injunction to restore the banks of a canal and to make other repairs upon and about canals and reservoirs leased by defendant to complainant, yet substantially the same result may be attained by an order restraining defendant from impeding or hindering complainant in the use of the water granted by his lease, by continuing to keep the canals and works out of repair, and by diverting the water and hindering complainant in its use.<sup>47</sup> And a mandatory injunction may be granted to compel the restoration of water to its natural channel which has been wrongfully diverted therefrom.<sup>48</sup> So relief by mandatory

<sup>45</sup> *Avery v. Fox*, 1 Abb. U. S. R., 246; *United States v. Mississippi & R. R. B. Co.*, 1 McCrary, 601. And in *Avery v. Fox*, 1 Abb. U. S. R., 246, it is held that where Congress entrusts an appropriation for public improvements to one of the departments, which in turn employs agents to do the work, this department and its agents may be restrained from doing the work in an improper manner, even though an injunction will not lie against the United States.

<sup>46</sup> *Great Falls v. Worster*, 23 N. H., 462. And in *Portarlington v. Soulby*, 3 Myl. & K., 104, the same principle was recognized upon a bill filed in England to restrain re-

spondents from bringing an action at law in Ireland on a bill of exchange given for a gambling debt. But see, *contra*, *Stillman v. White Rock Manufacturing Co.*, 3 Woodb. & M., 538, where it is held that the jurisdiction is *in rem*, and that a nuisance consisting of a diversion of water from a river which is the boundary line between two states must be enjoined in the state where the nuisance is located. And see, *ante*, § 33.

<sup>47</sup> *Lane v. Newdigate*, 10 Ves., 192.

<sup>48</sup> *Corning v. Troy Factory*, 40 N. Y., 191, affirming S. C., 34 Barb., 485, 39 Barb., 311. This was an action for a mandatory injunction to compel defendants to restore a



injunction has been granted to compel defendants to fill up a ditch which they had deepened for the purpose of leading surface water from their lands, resulting in serious injury to the lands of adjoining owners.<sup>49</sup>

§ 835. **Discharge from mine.** The filling up of the original channel of a stream with the refuse and offcast from an adjacent mine, to such an extent as to back the water up to complainant's mill-dam, constitutes such a nuisance as to warrant relief by injunction. And where defendants in such case persist in making deposits of earth in such manner as to obstruct the flow of the water, to the manifest injury of complainant, the injunction will be continued.<sup>50</sup> So a per-

stream of water to its natural channel and thus allow plaintiffs the use to which they were entitled. Grover, J., says: "Upon established principles this is a proper case of equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies can not restore it to them and secure them in the enjoyment of it. Hence the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the

plaintiffs to the equitable relief sought is established by authority as well as principle. (*Webb v. The Portland Manufacturing Co.*, 3 Sumner, 190, and cases cited; *Tyler v. Wilkinson*, 4 Mason, 400; *Townsend v. McDonald*, 2 Kernan, 381; 2 Story's Equity, §§ 901, 926-7; Angell on Water Courses, §§ 449-50.) It is further insisted by the defendant that equity will not interpose until the right has been settled at law. That formerly was the universal rule, where there was any substantial doubt as to the legal right. (*Gardner v. The Trustees of Newburgh*, 2 John. Ch., 162.) But that rule no longer prevails in this state. We have before seen that all the relief to which a party is entitled, arising from the same transaction, may, under the code, be obtained in one suit. Besides there is no doubt as to the legal right in the present case."

<sup>49</sup> *Foot v. Bronson*, 4 Lans., 47.

<sup>50</sup> *Lamborn v. Covington Company*, 2 Md. Ch. 409.

petual injunction will be granted to restrain defendants from discharging water from their mines and colliery into a stream to the injury of plaintiff's work and mill below, the water thus pumped from defendant's mine into the stream being charged with sulphuric acid and other deleterious matters, causing great injury to plaintiff's boilers and other machinery.<sup>51</sup> So an injunction will lie to restrain the discharge of the refuse of a coal mine into a running stream, resulting in the accumulation of coal dust upon the dam of a mill owner further down the stream, thereby impairing the latter's water power.<sup>52</sup> So a mining company may be enjoined in a suit by a lower mill owner from discharging turbid and discolored water from its mines into a river, thereby discoloring the water and rendering it unfit for plaintiff's use in the manufacture of white tissue paper; and in such case it is no defense that the river is more or less polluted by the discharge of other mines.<sup>53</sup>

§ 806. **When relief allowed between tenants in common.**

The relief is sometimes sought between tenants in common of water privileges, and the fact of co-tenancy will not prevent the exercise of the jurisdiction.<sup>54</sup> Thus, where the parties are tenants in common of a mill, mill-dam and water privilege, one of the co-tenants will be restrained from diverting the water to a private mill of his own in such manner as to prevent complainant's manufactory from running except for a short time daily.<sup>55</sup> So where tenants in common of a mill and dam are entitled to their use alternately in proportion to their interests, one of them will be restrained from diverting the water through a private channel on his own premises during the other's term of use.<sup>56</sup> But equity will not enjoin an

<sup>51</sup> *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D., 769.

<sup>52</sup> *Keppel v. L. C. & N. Co.*, 200 Pa. St., 649, 50 Atl., 302.

<sup>53</sup> *Beach v. Sparks Mfg. Co.*, 54 N. J. Eq., 65, 33 Atl., 286.

<sup>54</sup> *Kennedy v. Scovil*, 12 Conn., 316; *Bliss v. Rice*, 17 Pick., 23.

<sup>55</sup> *Kennedy v. Scovil*, 12 Conn., 316.

<sup>56</sup> *Bliss v. Rice*, 17 Pick., 23. But the court holding that each co-ten-

alleged nuisance consisting in an interference with plaintiff's water-power and mill privileges, when the parties are in dispute as to their legal rights, and when no irreparable injury is shown and no necessity for the prevention of a multiplicity of suits, but will leave the parties to a litigation at law to determine their disputed legal rights.<sup>57</sup>

§ 807. **Waste of water supplying mill.** Equity may properly restrain defendants from wasting water running to complainants' mill, and thereby diminishing their water power.<sup>58</sup> If, however, the injury is small and can be adequately compensated in damages, equity will not interfere, but will leave the parties to their remedy at law. Nor in such a case will it avail complainant that he has established his right at law.<sup>59</sup>

§ 808. **Restrictions upon the relief.** It is also held that to entitle one to an injunction against a nuisance, he must show that he has sustained such a substantial injury by the acts of defendant as would have entitled him to a verdict in an action at law for damages. And when this is not shown, and when it does not appear that defendant's use of the water really is a nuisance, equity will decline to interfere and will leave the question to be determined at law. Nor will a diversion of water in a stream be enjoined when the stream is restored to its old channel by defendant before it enters upon plaintiff's

ant had a right during his term to use the whole of the water in such way as he chose, without injury to the common property, refused to enjoin defendant to fill up his channel, or to desist from drawing water by such channel during his own term of using the mill.

<sup>57</sup> *Burnham v. Kempton*, 44 N. H., 78.

<sup>58</sup> *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 324. In this case complainants had erected a reservoir to collect water for their mill during the dry season, and

defendants raised the gate of the reservoir, allowing the water to escape. An injunction was held to be the proper remedy on the ground that the injury was a private nuisance, and a statute giving the court jurisdiction in equity in all cases of nuisance, the relief was proper, the remedy at law not being plain, adequate and sufficient. And see *Bemis v. Upham*, 13 Pick., 169, a case arising under the same statute.

<sup>59</sup> *Quackenbush v. Van Riper*, 2 Green Ch., 350.

land.<sup>60</sup> So the question of relative inconvenience to the parties may be considered upon an application to enjoin a nuisance to water. And when plaintiff's right has not been established at law, and the question of nuisance is not clearly established, and the allowance of an injunction would totally suspend defendant's works, thereby causing the greatest injury, the court may properly refuse to interfere.<sup>61</sup>

§ 809. **Questions of surface water.** Questions of much nicety have occurred touching the exercise of the jurisdiction in cases involving the flowage of surface water. For example, when plaintiff is entitled to water flowing from surface springs on defendant's land by natural channels to and upon the land of plaintiff, defendant may be enjoined from diverting the water in such manner as to prevent its flowing in its natural course.<sup>62</sup> And where a city has under contract with a land owner constructed across his premises, which are beyond the city limits, a ditch for drainage purposes, the city having complied with its undertaking in good faith, it may enjoin such land owner from obstructing the ditch.<sup>63</sup> So the leading of surface water from one's premises upon those of another, causing overflow and injury to the latter, may be enjoined as a nuisance.<sup>64</sup> Thus, where defendant, by digging a ditch for that purpose, draws off surface water which has accumulated in a natural pond or reservoir upon his own premises, to and upon the premises of plaintiff adjoining, the injury being continuous in its nature affords sufficient ground for relief by injunction.<sup>65</sup> And the owner of real property may enjoin a

<sup>60</sup> *Elmhirst v. Spencer*, 2 Mac. & G., 45; *Kensit v. Great Eastern R. Co.*, 23 Ch. D., 566, affirmed on appeal, 27 Ch. D., 122.

<sup>61</sup> *Elmhirst v. Spencer*, 2 Mac. & G., 45.

<sup>62</sup> *Ennor v. Barwell*, 2 Gif., 410.

<sup>63</sup> *City of Coldwater v. Tucker*, 36 Mich., 474.

<sup>64</sup> *Pettigrew v. Evansville*, 25 Wis., 223; *Foot v. Bronson*, 4 Lans., 47; *Davis v. Londgreen*, 8 Neb., 43. See also *Pence v. Garrison*, 93 Ind., 345.

<sup>65</sup> *Davis v. Londgreen*, 8 Neb., 43; *Jacobson v. Boening*, 48 Neb., 80, 66 N. W., 993, 32 L. R. A., 229, 58 Am. St. Rep., 684. See also *Pence v. Garrison*, 93 Ind., 345.

municipal corporation from draining off through an artificial channel a pond or reservoir adjoining his premises in such manner as to overflow them, and to cause permanent injury.<sup>66</sup> So a mandatory injunction has been allowed to compel defendants to fill up a ditch which they had lowered, thereby leading surface water upon plaintiff's grounds, and to restrain them from again lowering the ditch.<sup>67</sup> But while relief by injunction is thus freely granted in cases where the injury is continuous in its nature, and is not susceptible of adequate compensation in damages, the leading of surface water upon another's land will not be enjoined when the pecuniary injury thereby sustained is definitely ascertained by witnesses, since in such case adequate relief may be had by an action for damages.<sup>68</sup> Nor can the owner of a lot abutting upon a street enjoin the city from constructing drains or culverts in the street which may increase the flow of surface water upon his land.<sup>69</sup> Nor will highway commissioners be enjoined from constructing a road in such manner as to throw the water upon plaintiff's land adjoining the road, when it is not shown that full damages were not awarded to plaintiff by the commissioners, and when their proceedings, if erroneous, might have been corrected by appeal.<sup>70</sup> And in this class of cases the relief will not be granted to one who shows no legal or equitable title to the premises in question, but only a naked possession.<sup>71</sup>

§ 810. **Pollution of streams by sewage.** Frequent ground of application for the preventive aid of equity by injunction is found in cases of the pollution of water by the flow of sewage from towns or cities into streams whose waters are thereby injured or rendered unfit for use. In cases of this nature, the

<sup>66</sup> *Pettigrew v. Evansville*, 25 63 Wis., 228, 23 N. W., 495.

Wis., 223.

<sup>70</sup> *State v. Hanna*, 97 Ind., 469.

<sup>67</sup> *Foot v. Bronson*, 4 Lans., 47.

<sup>71</sup> *Denner v. Chicago, M. & St. P.*

<sup>68</sup> *Laney v. Jasper*, 39 Ill., 46.

R. Co., 57 Wis., 218, 15 N. W., 158.

<sup>69</sup> *Heth v. City of Fond du Lac*,



preventive jurisdiction of equity is well established, the general doctrine being that the fouling or pollution of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction.<sup>72</sup> In conformity with this doctrine, the owners of land upon the banks of a river below a city may enjoin the city authorities from polluting the river by sewage.<sup>73</sup> So the owner of a mill pond who uses the waters thereof for manufacturing purposes may enjoin the pollution of such waters by the discharge by a city of its sewage into the pond.<sup>74</sup> And when a public or municipal body, acting in excess of its lawful powers, is about to construct a sewer in such manner as to injure the water in a river, it may be restrained from proceeding.<sup>75</sup> So an injunction is proper to restrain municipal authorities from opening additional sewers into a stream at a point above plaintiff's premises in such manner that the sewage fouls the water and renders it unfit for use.<sup>76</sup> And a board of commissioners charged with the drainage of a town may be enjoined from permitting the

<sup>72</sup> *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch., 146; *Attorney-General v. Leeds Corporation*, L. R. 5 Ch., 583; *Holt v. Corporation of Rochdale*, L. R. 10 Eq., 354; *Attorney-General v. Bradford Canal*, L. R. 2 Eq., 71; *Attorney-General v. Council of Birmingham*, 4 Kay & J., 528; *Oldaker v. Hunt*, 6 DeGex, M. & G., 376, affirming S. C., 19 Beav., 485; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch., 349, affirming S. C., L. R. 1 Eq., 161; *Lingwood v. Stowmarket Co.*, L. R. 1 Eq., 77; *Village of Dwight v. Hayes*, 150 Ill., 273, 37 N. E., 218, 41 Am. St. Rep., 367; *City of Kewancee v. Otley*, 204 Ill., 402, 68 N. E., 388; *Peterson v. City of Santa Rosa*, 119 Cal., 387, 51 Pac., 557; *Morgan v. City*

*of Danbury*, 67 Conn., 484, 35 Atl., 499; *Winchell v. City of Waukesha*, 110 Wis., 101, 85 N. W., 668, 84 Am. St. Rep., 902; *Carmichael v. City of Texarkana*, 94 Fed., 561. And see *Attorney-General v. Richmond*, L. R., 2 Eq., 306.

<sup>73</sup> *Attorney-General v. Leeds Corporation*, L. R. 5 Ch., 583.

<sup>74</sup> *Middlesex Co. v. City of Lowell*, 149 Mass., 509, 21 N. E., 872.

<sup>75</sup> *Oldaker v. Hunt*, 6 DeGex, M. & G., 376, affirming S. C., 19 Beav., 485.

<sup>76</sup> *Attorney-General v. Council of Birmingham*, 4 Kay & J., 528. And in this case the court incline to consider only the right of plaintiff to relief, rather than the question of inconvenience to defendants, although defendants represented a large population.

sewage of the town to be discharged into a stream which passes through plaintiff's premises and supplies a lake thereon, when such sewage has an injurious effect upon the water in the stream and lake.<sup>77</sup> So the owner of premises watered by a stream used for domestic purposes may enjoin a city from polluting the stream by the discharge of sewage to such an extent as to constitute a nuisance.<sup>78</sup>

§ 811. **The same.** Where, however, the nuisance complained of consists in the draining of sewage whereby plaintiffs, as they allege, fear that the water in the springs and wells upon their premises will be contaminated, but the injury is only problematical and theoretical, the answer distinctly denying the allegations of the bill, a preliminary injunction will be dissolved.<sup>79</sup> And where the injury resulting from the pollution of water by sewage from a city is not at all imminent and will result, if at all, only in the future, upon the possible extension of the sewage system, relief by injunction will be denied.<sup>80</sup> So an injunction will not be allowed to restrain a city from discharging its sewage into a stream, to the alleged injury of a city located lower down, which relies upon the stream as its sole source of water supply, where the fact of the nuisance is not made out by clear and satisfactory evidence, the testimony being conflicting and there being no showing that the injury is real and immediate.<sup>81</sup> And when the injury sustained is not serious and is no greater than it has been for

<sup>77</sup> *Goldsmid v. Tunbridge Wells Sewage, see Blackburne v. Somers,* Improvement Commissioners, L. 5 L. R. Ir. 1.

R. 1 Ch., 349, affirming S. C., L. <sup>78</sup> *Chapman v. City of Rochester,* R. 1 Eq., 161. And see, as to the 110 N. Y., 273, 18 N. E., 88.

violation of such an injunction and <sup>79</sup> *Lytton v. Steward,* 2 Tenn. Ch., the punishment therefor, *Spokes v.* 586.

*Banbury Board of Health,* L. R. 1 <sup>80</sup> *City of Hutchinson v. Delano,* 46 Kan., 345, 26 Pac., 740.

Eq., 42. As to the right of a riparian owner to enjoin the pollution of <sup>81</sup> *Newark Aqueduct Board v.* City of Passaic, 45 N. J. Eq., 393, a stream by an owner above, and 18 Atl., 106, affirmed 46 N. J. Eq., as to the right of defendant, by 552, 20 Atl., 54, 22 Atl., 55.

many years past, and when it will soon be in course of abatement by an act of parliament soon to take effect, an injunction will be refused.<sup>82</sup> And where a stream flowing through a city affords the only possible means of drainage for the city, without which no system of drainage could be adopted, a lower riparian owner who is injured thereby can not enjoin the municipality from polluting the water of the stream by discharging sewage into it.<sup>83</sup> So when defendants, a municipal body charged with the drainage of a given locality, have not themselves committed any act contributing to the nuisance in question, and have only permitted the system of sewage to be continued in like manner as before their appointment, an injunction may be refused.<sup>84</sup> Even in cases where the injunction is allowed it is proper to insert in the writ the words "to the injury" of plaintiff, since he must sustain injury or damage to entitle him to the relief.<sup>85</sup>

§ 812. **Navigable rivers; erection of wharves; obstructions.**

A navigable river being a public highway, to be used by all citizens for reasonable purposes and in a reasonable manner, a riparian owner upon such river may be protected by injunction against any obstruction or interference with the right of access by his vessel to a wharf, for the purpose of loading and unloading.<sup>86</sup> And where plaintiff is the owner and in possession of a private wharf in front of his premises upon a navigable water, he is entitled to enjoin the erection of another wharf in such manner as to deprive him of access to the water, unless defendants can show a legal right derived from competent authority to proceed with their work. And when, in

<sup>82</sup> Attorney-General *v.* Gee, L. R. 10 Eq., 131.

<sup>83</sup> City of Valparaiso *v.* Hagen, 153 Ind., 337, 54 N. E., 1062, 48 L. R. A., 707, 74 Am. St. Rep., 305.

<sup>84</sup> Glossop *v.* Heston & Isleworth Local Board, 12 Ch. D., 102; At-

torney-General *v.* Guardians of Poor, 20 Ch. D., 595.

<sup>85</sup> Lingwood *v.* Stowmarket Co., L. R. 1 Eq., 77.

<sup>86</sup> Original Hartlepool Collieries Co. *v.* Gibbs, 5 Ch. D., 713. See Turner *v.* People's Ferry Co., 22 Blatch., 272; S. C., 21 Fed., 90.

such a case, defendants rely upon a contract with a board of public officers authorizing the erection of their proposed wharf, a compliance with the law by such officers in letting the contract must be shown; and unless the statute has been substantially complied with the contract will be held void and an injunction will be granted.<sup>87</sup> So the owner of lands fronting upon a navigable river, who is entitled under the laws of the state to erect wharves upon the water frontage may enjoin the erection of obstructions to such wharves.<sup>88</sup> And the erection by defendant of piers in the bed of a stream running through his land, in such manner as to obstruct the natural flow of the water and cause it to set back upon lands belonging to plaintiffs farther up the stream, may be enjoined as a nuisance.<sup>89</sup> But the erection of a wharf in tide waters is not of itself such a nuisance as to warrant an injunction when the navigation is not injured by such erection. And when land owners upon a navigable water seek to restrain the erection of a wharf, an interlocutory injunction will be denied when it is doubtful upon the evidence whether the proposed wharf would be a nuisance, and when no great or irreparable injury to plaintiffs is likely to result therefrom.<sup>90</sup> So a vessel owner upon a navigable river can not enjoin a railway company from constructing its road along and in front of docks and wharves upon the bank of the river, when the company is proceeding under legislative authority.<sup>91</sup> Nor can a wharf owner restrain an adjacent owner from depositing earth and other matter in the vicinity of a wharf, when the injury may be readily compensated in damages.<sup>92</sup>

<sup>87</sup> *Cowell v. Martin*, 43 Cal., 605.

<sup>88</sup> *Parker v. Taylor*, 7 Ore., 435.

<sup>89</sup> *Gillespie v. Forrest*, 18 Hun, 110.

<sup>90</sup> *Thornton v. Grant*, 10 R. I., 477. But it would seem from the opinion of the court that if the proposed wharf would occupy a por-

tion of the water-front adjoining plaintiff's premises, they might be entitled to an injunction.

<sup>91</sup> *Ormerod v. New York, W. S. & B. R. Co.*, 21 Blatch., 106.

<sup>92</sup> *Hawley v. Beardsley*, 47 Conn., 571.

§ 813. **Riparian owners allowed relief.** Riparian owners upon a navigable river, who would sustain a special and peculiar injury to their property by the threatened act of defendant in filling in the river adjacent to their premises, may have the aid of an injunction to prevent the commission of the threatened act, the damages which plaintiffs would sustain being peculiar to themselves and different both in degree and in kind from those sustained by the public.<sup>93</sup>

§ 814. **Logs and booms; obstruction by railway.** It is also held that riparian owners upon a navigable river, who are lawfully in possession of piers and booms which they have erected for the purpose of handling logs floating down the river, may enjoin such an obstruction of the river below as will interfere with the beneficial use of their property above; although they will not be allowed to enjoin absolutely other riparian proprietors from erecting any boom whatever upon the river.<sup>94</sup> And the construction and operation by defendant of a boom for the collection of logs in a river, whereby the logs are driven and forced upon plaintiff's land, injuring his land, trees and herbage, and preventing him from having free and uninterrupted access to the river, will justify a court of equity in extending relief by injunction.<sup>95</sup> But where it was sought to enjoin a railway company from obstructing a stream to the injury of a town, it was held that, whether the town did or did not receive such special injury from the obstructions in question as to entitle it to an injunction, the relief should be refused until the question of whether the acts of the company were within its charter could be determined at law.<sup>96</sup>

§ 815. **Regatta upon lake; pollution of fish ponds.** The owner of a mansion house with a park and an estate adjacent

<sup>93</sup> *Musser v. Hershey*, 42 Iowa, 356. As to the right of a riparian owner to enjoin the construction of a wharf and the depositing of material in the navigable waters of a bay or harbor, see *Sullivan v. Moreno*, 19 Fla., 200.

<sup>94</sup> *Stevens Point Boom Co. v. Reilly*, 44 Wis., 295.

<sup>95</sup> *Cotton v. Mississippi & R. R. B. Co.*, 19 Minn., 497.

<sup>96</sup> *Sheboygan v. Sheboygan & F. R. Co.*, 21 Wis., 675.



to a lake, having certain exclusive rights of fishing in the lake, has been allowed an injunction to restrain the holding of regattas thereon, upon the ground of nuisance, after a verdict at law establishing his legal title.<sup>97</sup> And where plaintiff has constructed and maintained artificial ponds upon his premises for the breeding and propagation of trout, and defendants dig a ditch from the rear of their dwelling house to the stream supplying the trout-ponds with water, for the purpose of carrying off the refuse water and drainage from defendant's house, thereby fouling the stream and destroying the trout, an injunction will lie to restrain defendants from using the ditch thus constructed.<sup>98</sup> And in general the destruction of fish by the pollution of the waters of lakes and ponds will be enjoined as a public nuisance in a suit brought by the proper public authorities. And the relief is properly granted in such cases although the right of fishery may be in the private riparian owner.<sup>99</sup>

§ 815*a*. **Raising or lowering of lake level.** The owner of land bordering upon a pond, lake or other natural body of water is entitled to an injunction against a defendant, such as a mill owner located at the outlet of the body of water, who, by the employment of artificial means, is raising or lowering the water of the pond above or below its natural level, to the injury of the plaintiff who is specially damaged thereby.<sup>1</sup>

<sup>97</sup> *Bostock v. North Staffordshire R. Co.*, 5 DeGex & Sm., 584.

<sup>1</sup> *Potter v. Howe*, 141 Mass., 357, 6 N. E., 233, 2 New Eng. Rep.,

<sup>98</sup> *Seaman v. Lee*, 10 Hun, 607.

167; *Fernald v. Knox W. Co.*, 82

<sup>99</sup> *People v. Truckee L. Co.*, 116 Cal., 397, 48 Pac., 374, 39 L. R. A., 459.

Me., 48, 19 Atl., 93, 7 L. R. A.,

581, 58 Am. St. Rep., 183.

## V. STREETS AND HIGHWAYS.

- § 816. General doctrine as to obstructions.
- 817. Limitations upon the doctrine.
- 818. Closing up of street; lease of street; joinder of plaintiffs.
- 819. Diversion of public highway by railroad.
- 820. Approach to bridge.
- 821. Abandonment of highway; acquiescence in obstruction.
- 822. Taking up pavements.
- 823. Existence of legal remedy a bar to relief.
- 824. Projection in building.
- 825. Discharge of sewage as between municipal corporations.
- 825*a*. Erection of telegraph and telephone lines.
- 825*b*. Bridging of highway.
- 825*c*. City market place in highway.

§ 816. **General doctrine as to obstructions.** The remedy by injunction is the most efficient means of preventing obstructions to public highways, and where the facts are easy of ascertainment and the rights resulting therefrom are free from doubt, the relief will be granted at the suit of a citizen having an immediate and special interest in the matter.<sup>1</sup> And the rule may be asserted generally that the owner of property abutting upon a public highway is entitled to the aid of equity to restrain any unlawful or unauthorized obstruction of the street in front of his premises, whereby he suffers special injury, different from that sustained by the public, the right to the relief being founded upon the general inadequacy of the remedy at law.<sup>2</sup> And a mandatory injunc-

<sup>1</sup> *Green v. Oakes*, 17 Ill., 249; 236, 93 Am. St. Rep., 133; *Louis-Craig v. The People*, 47 Ill., 487. *Louisville & N. R. Co. v. M., J. & K. C.*

<sup>2</sup> *Wilder v. De Cou*, 26 Minn., 10, R. Co., 124 Ala., 162, 26 So., 895; 1 N. W., 48; *Gustafson v. Hamm*, Whaley v. Wilson, 112 Ala., 627, 20 56 Minn., 334, 57 N. W., 1054, 22 So., 922; *Richi v. Chattanooga L. R. A.*, 565; *Glaessner v. A.-B. B. Brewing Co.*, 105 Tenn., 651, 58 S. Assn., 100 Mo., 508, 13 S. W., 707; W., 646; *Hart v. Buckner*, 5 C. C. Canton Cotton W. Co. v. Potts, 39 A., 1, 54 Fed., 925; *Schewde v. Miss.*, 31, 10 So., 448; *Thompson Heinrich Bros.*, 29 Wash., 21, 69 v. Maloney, 199 Ill., 276, 65 N. E., Pac., 362; *Gardner v. Stroever*, 89

tion is the proper and, indeed, the usual form of relief granted in such cases.<sup>3</sup> Upon similar grounds the owner of a farm abutting upon a highway is entitled to an injunction to prevent the obstruction of the highway and to maintain it in its original condition.<sup>4</sup> So a farm owner who suffers a special injury not common to the general public may have an injunction to compel the removal of an obstruction to the highway which materially impairs his right of ingress and egress, although he is not entirely deprived of access to his land.<sup>5</sup> So the obstruction of a highway which forms the only means of access to plaintiff's premises upon which he has erected expensive buildings for manufacturing purposes may be enjoined.<sup>6</sup> So the erection of a fence across a traveled highway or the unlawful excavation of a ditch may be enjoined by the town authorities, the liability of the town for damages for injuries sustained by such obstruction constituting a sufficient interest in the subject-matter to render the town a proper plaintiff in such case.<sup>7</sup> So a city, village or other municipality, having control of the highways within its limits, may, enjoin the unlawful obstruction of such highways, the remedy by mandatory injunction being regarded as more simple and effective than the remedy at law.<sup>8</sup> And when the erection of a

Cal., 26, 26 Pac., 618. But see *Packet Co. v. Sorrels*, 50 Ark., 463, 8 S. W., 683. And in such cases it is immaterial whether the fee to the street is in the municipality or in the abutter. *Schewde v. Heinrich Bros.*, 29 Wash., 21, 69 Pac., 362.

<sup>3</sup> *Martin v. Marks*, 154 Ind., 549, 57 N. E., 249; *Gardner v. Stroever*, 89 Cal., 26, 26 Pas., 618; *City of Oshkosh v. M. & L. W. R. Co.*, 74 Wis., 534, 43 N. W., 489, 17 Am. St. Rep., 175; *City of Eau Claire v. Matzke*, 86 Wis., 291, 56 N. W., 874, 39 Am. St. Rep., 900; *Town of*

*Neshkoro v. Nest*, 85 Wis., 126, 55 N. W., 176.

<sup>4</sup> *De Witt v. Van Schoyk*, 110 N. Y., 7, 17 N. E., 425; *McQuigg v. Cullins*, 56 Ohio St., 649, 47 N. E., 595.

<sup>5</sup> *Martin v. Marks*, 154 Ind., 549, 57 N. E., 249.

<sup>6</sup> *Ross v. Thompson*, 78 Ind., 90.

<sup>7</sup> *Town of Burlington v. Schwarzman*, 52 Conn., 181; *Hygeia M. S. Co. v. Village of Waukesha*, 83 Wis., 475, 53 N. W., 675.

<sup>8</sup> *City of Oshkosh v. M. & L. W. R. Co.*, 74 Wis., 534, 43 N. W., 489, 17 Am. St. Rep., 175; *Town of*

toll-gate in a highway will operate as a public nuisance, it may be restrained at the suit of an adjoining property owner who sustains a special injury.<sup>9</sup> And the obstruction of a street, by erecting a house or other building thereon, is a public nuisance which may be restrained in a suit brought by the attorney-general upon behalf of the public,<sup>10</sup> or by adjacent lot owners who suffer a special injury from the obstruction.<sup>11</sup> So equity will interfere to prevent the unauthorized raising of the level of a street which will result in depriving plaintiff, an abutting owner, of his right of ingress and egress.<sup>12</sup> So a property owner may enjoin the maintenance of trolley poles in the highway in front of his premises where it is alleged that they are so placed not because of any necessity therefor but for the purpose of annoying plaintiff and injuring his property.<sup>13</sup> And a railroad company which has acquired by condemnation land bordering upon a public highway may enjoin an unauthorized obstruction of the highway.<sup>14</sup> And the unreasonable obstruction of a public street by backing vans up to the curb in front of defendant's store for the purpose of loading and unloading, thereby impeding free passage along the highway has been held to be a public nuisance which may be enjoined in an action instituted by the attorney-general.<sup>15</sup> And a property owner who suffers special

*Neshkoro v. Nest*, 85 Wis., 126, 55 N. W., 176; *City of Eau Claire v. Matzke*, 86 Wis., 291, 56 N. W., 874, 39 Am. St. Rep., 900; *Metropolitan City R. Co. v. City of Chicago*, 96 Ill., 620; *Chicago, B. & Q. R. Co. v. City of Quincy*, 136 Ill., 489, 27 N. E., 232; *City of Demopolis v. Webb*, 87 Ala., 659, 6 So., 408; *Reed v. Mayor*, 92 Ala., 339, 9 So., 161. And see, *post*, § 1555.

<sup>9</sup> *Snell v. Buresh*, 123 Ill., 151.

<sup>10</sup> *Attorney-General v. County Council of Mayo*, (1902) 1 L. R. Ir., 13.

<sup>11</sup> *Corning v. Lowerre*, 6 Johns. Ch., 439; *Pennsylvania S. V. R. Co. v. Reading Paper Mills*, 149 Pa. St., 18, 24 Atl., 205.

<sup>12</sup> *Schaufele v. Doyle*, 86 Cal., 107, 24 Pac., 834.

<sup>13</sup> *Snyder v. Street R. Co.*, 105 Iowa, 284, 75 N. W., 179, 41 L. R. A., 345.

<sup>14</sup> *Pennsylvania S. V. R. Co. v. Reading Paper Mills*, 149 Pa. St., 18, 24 Atl., 205.

<sup>15</sup> *Attorney-General v. Brighton & H. C. S. Assn.*, (1900) 1 Ch., 276.

damage may enjoin the unlawful obstruction of the street in front of his premises by the assembling in large and disorderly crowds of former employees who have gone on a strike.<sup>16</sup> And where public officers are proceeding under claim of right to open a private way across the works of a railway company, equity may interfere by injunction, although the persons injured might await the completion of the road and then recover damages for injuries sustained, where the public officers having charge of the road are proceeding illegally and improperly, and where the interference is necessary to prevent a multiplicity of suits.<sup>17</sup>

§ 817. **Limitations upon the doctrine.** It is to be observed, however, that the rule requiring complainants to show a special injury peculiar to themselves and distinct from the general inconvenience experienced by the public is inflexible.<sup>18</sup> Where, therefore, they fail to show such injury, and own no property fronting upon the street, the relief will be withheld, even though they be residents and taxpayers.<sup>19</sup> And the fact of one's traveling the road frequently and being greatly inconvenienced by its obstruction will not authorize the injunction in the absence of any special injury.<sup>20</sup> So the obstruction of a highway by the erection of a toll-gate, and demanding and receiving toll from persons crossing a bridge in the highway, although a public nuisance, will not be enjoined when plaintiffs show no special damage or injury to themselves, distinct from that sustained by the public.<sup>21</sup> Moreover proof of special

<sup>16</sup> *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed., 608.

<sup>17</sup> *Mohawk & H. R. Co. v. Artcher*, 6 Paige, 83.

<sup>18</sup> *Corning v. Lowerre*, 6 Johns. Ch., 439; *Shed v. Hawthorne*, 3 Neb., 179; *Wellborn v. Davies*, 40 Ark., 83; *Perkins v. M. & C. T. Co.*, 48 N. J. Eq., 499, 22 Atl., 180; *Gut-tery v. Glenn*, 201 Ill., 275, 66 N. E., 305.

<sup>19</sup> *McCowan v. Whitesides*, 31 Ind., 235; *Davis v. Mayor*, 4 Kern., 506; *Dawson v. St. Paul F. & M. Ins. Co.*, 15 Minn., 136.

<sup>20</sup> *McCowan v. Whitesides*, 31 Ind., 235.

<sup>21</sup> *Shed v. Hawthorne*, 3 Neb., 179; *Perkins v. M. & C. T. Co.*, 48 N. J. Eq., 499, 22 Atl., 180.



injury to complainants will not, of itself, suffice to warrant an injunction, and the court will require, as in the case of trespass, that irreparable damage be shown, and where this does not appear the relief will be withheld, even though the persons aggrieved show a special and personal injury.<sup>22</sup> Nor will the injunction issue when the right to the use of the highway or street has not been established at law and is denied and involved in great doubt.<sup>23</sup> So, too, the court will refuse to interfere where the obstruction is not necessarily a nuisance *per se* but something which may or may not be, according to circumstances. In such case an injunction will not be allowed until the matter has been determined by a jury.<sup>24</sup> And a supervisor of highways, as such, can have no injunction to restrain obstructions to a highway.<sup>25</sup>

§ 818. **Closing up of street; lease of street; joinder of plaintiffs.** An injunction is the appropriate remedy to prevent the unauthorized obstruction or closing up of a public street, at the suit of adjacent lot owners who have sustained such a special injury as to make them proper parties plaintiff. And it is a sufficient averment of the injury to allege that such obstruction will greatly depreciate the value of their lots and buildings, and will greatly increase the liability of their buildings to fire, and otherwise seriously injure their property. And it is held to be competent, in such a case, for several different lot owners adjoining the street, although holding their titles in severalty, to join in the bill for injunction.<sup>26</sup> And the obstruction of a sidewalk in front of defendant's store, by loading and unloading goods to such an extent as to interfere seriously with and obstruct passen-

<sup>22</sup> Fort v. Groves, 29 Md., 188; Zabriskie v. Jersey & B. R. Co., 2 Beas., 314; Sargent v. George, 56 Vt., 627; Chicago Gen. Ry. Co. v. C., B. & Q. R. Co., 181 Ill., 605, 54 N. E., 1026.

<sup>23</sup> Walts v. Foster, 12 Ore., 247, 7 Pac., 24.

<sup>24</sup> Dunning v. Aurora, 40 Ill., 481; Lake View v. Letz, 44 Ill., 81.

<sup>25</sup> Putnam v. Valentine, 5 Ohio, 187.

<sup>26</sup> Pettibone v. Hamilton, 40 Wis., 402. See also Town of Sullivan v. Phillips, 110 Ind., 320, 11 N. E., 300. And see, *ante*, § 757.

gers upon the walk, may be restrained at the suit of one occupying premises in the immediate vicinity and who suffers a special injury by such obstruction.<sup>27</sup> So the leasing of a portion of a public highway for purely private purposes, as to vendors of produce, may be enjoined as a nuisance at the suit of an adjacent property owner who suffers special damage because of the interference with his right of ingress and egress.<sup>28</sup> So property owners, whose lots abut upon a public street, may restrain private citizens, acting without authority, from altering the grade of a street in such manner as to render plaintiff's improvements less secure and more difficult of access.<sup>29</sup> But owners of lots which abut upon the street at points distant from the obstruction in question can not have relief by injunction, since they sustain no special injury different from that to the public.<sup>30</sup> And in such case the fact that the plaintiff is compelled to resort to a more circuitous and roundabout route to reach portions of the city does not constitute special injury within the meaning of the rule.<sup>31</sup> And where a portion of a highway other than that upon which plaintiff abuts has been vacated and has reverted to defendants as abutting owners, plaintiff can not enjoin them from obstructing their portion of the highway where he has reasonable, though less convenient, access to his property by other streets, since, in such case, the injury which he suffers, though greater in degree, is not different in kind from that suffered by the public generally.<sup>32</sup>

<sup>27</sup> *Callanan v. Gilman*, 107 N. Y., 360, 14 N. E., 264.

<sup>28</sup> *Schopp v. City of St. Louis*, 117 Mo., 131, 22 S. W., 898, 20 L. R. A., 783.

<sup>29</sup> *Price v. Knott*, 8 Ore., 438.

<sup>30</sup> *Billard v. Erhart*, 35 Kan., 611, 12 Pac., 39; *Barnum v. Minnesota T. R. Co.*, 33 Minn., 365, 23 N. W., 538; *Guttery v. Glenn*, 201 Ill., 275, 66 N. E., 305. See also *City of*

*Chicago v. Union Building Association*, 102 Ill., 379; *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq., 351, 11 Atl., 751. And see, *ante*, §§ 594, 757.

<sup>31</sup> *Guttery v. Glenn*, 201 Ill., 275, 66 N. E., 305; *City of Chicago v. Union Building Association*, 102 Ill., 379.

<sup>32</sup> *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St., 264, 62 N. E., 341.

§ 819. **Diversion of public highway by railroad.** The unnecessary diversion of a public highway by a railway company in the construction of its road may be enjoined as a nuisance, although the railway company is by its charter empowered to change the location of any public road if necessary. A power thus conferred is not to be exercised merely because the company find it convenient or desirable to make such diversion, but there must be an actual necessity for its exercise. And in such case, the authorities of the municipality, having by law control of the streets and public places within its limits, and being liable for their preservation and repair, have such a special interest beyond that of the public at large in the subject-matter, as to render them proper parties to invoke the aid of the court.<sup>33</sup> And where a railroad company, in constructing its line in a public highway, has made an embankment and has otherwise unnecessarily obstructed the street, the municipality is entitled to a mandatory injunction to compel the company to restore the highway to its former condition of usefulness as a condition to using it for the purpose of its road.<sup>34</sup>

§ 820. **Approach to bridge.** When the right of the public to the use of a highway is clear and a special injury to plaintiff is threatened by its obstruction, such injury going to the substance and value of plaintiff's estate and being of a permanent character, equity may properly enjoin. Thus, where plaintiff is the proprietor of a toll-bridge, the approach to which is by a public highway, the obstruction of which must necessarily result in serious injury to the value of plaintiff's property as a toll-bridge, the injury being peculiar and not to be compensated adequately by an action at law, and being permanent in its nature, a proper case is presented

<sup>33</sup> *Easton & A. R. Co. v. Inhabitants of Greenwich*, 10 C. E. Green, 565, affirming S. C., 9 C. E. Green, 217.      <sup>34</sup> *City of Oshkosh v. M. & L. W. R. Co.*, 74 Wis., 534, 43 N. W., 489 17 Am. St. Rep., 175.

for relief by injunction.<sup>35</sup> And the obstruction of a public road leading to plaintiff's ferry may be enjoined as a nuisance.<sup>36</sup> So a nuisance to a public highway by cutting away the timbers supporting a roadway or approach to a bridge affords sufficient ground for the interposition of equity by injunction.<sup>37</sup> But a city can not maintain a bill to restrain prison convicts from working upon the streets upon the alleged ground that such work is a violation of a city ordinance and injurious to the public peace and good order.<sup>38</sup>

§ 821. **Abandonment of highway; acquiescence in obstruction.** Although the jurisdiction of equity in restraint of obstructions to roads and highways, by injunction in behalf of the people, is well established, it will not be exercised where the highway has been for a long period abandoned and disused, and where it does not appear that the public will suffer any inconvenience, or that public travel will be prevented or seriously incommoded; and this is especially true when the attorney-general and the relator in the information, with full knowledge of the facts, have permitted the work to proceed to partial completion without objection.<sup>39</sup>

§ 822. **Taking up pavements.** The taking up of pavements in a city for the purpose of laying gas pipes is not regarded as such a nuisance as to warrant relief by injunction, the inconvenience to the public being only temporary in its duration.<sup>40</sup> And this is true, even though the act in question is being done by an unincorporated gas company.<sup>41</sup>

<sup>35</sup> *Keystone Bridge Company v. Summers*, 13 West Va., 476.

<sup>36</sup> *Draper v. Mackey*, 35 Ark., 497.

<sup>37</sup> *Attorney-General v. Forbes*, 2 Myl. & Cr., 123.

<sup>38</sup> *Ward v. City of Little Rock*, 41 Ark., 526.

<sup>39</sup> *Attorney-General v. Brown*, 9 C. E. Green, 89.

<sup>40</sup> *Attorney-General v. Sheffield Gas Consumers Co.*, 3 DeGex, M. & G., 304; *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch., 71, reversing S. C., L. R. 6 Eq., 282.

<sup>41</sup> *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch., 71, reversing S. C., L. R. 6 Eq., 282.

§ 823. **Existence of legal remedy a bar to relief.** The existence of a legal remedy for the prevention or removal of an obstruction to a highway, is a material circumstance to be considered in cases of the character under discussion. And upon an information filed by the attorney-general of a state at the relation of the surveyors of highways of a town, seeking to restrain a manufacturing corporation from obstructing a public highway by laying and operating thereon a private railway track, it was held that no such obstruction to the rights of the public was disclosed as to justify the extraordinary remedy of an injunction, the surveyors' of highways being empowered by law to prevent or remove such obstruction.<sup>42</sup>

§ 824. **Projection in building.** To warrant the exercise of the extraordinary jurisdiction of equity in cases of obstructions to streets, some real and substantial injury must be shown as the result of the act which it is sought to enjoin. Equity will not, therefore, enjoin an encroachment upon a public highway or street by a projection in a building erected by defendants when no substantial injury is shown, and no real obstruction to the use of the street.<sup>43</sup> And a city may be enjoined from destroying a structure encroaching upon a street, when such structure is not a nuisance *per se*, and when the question of nuisance has never been determined.<sup>44</sup> But plaintiffs, who have purchased lots upon a street relying upon the grantor's representations that the street would be extended as shown by a plat submitted, may enjoin a defendant claiming under the same grantor from obstructing the proposed extension by the erection of a building.<sup>45</sup>

<sup>42</sup> Attorney-General *v.* Bay State Brick Co., 115 Mass., 431.

<sup>44</sup> Everett *v.* Marquette, 53 Mich., 450, 19 N. W., 140.

<sup>43</sup> City of Philadelphia's Appeal, 78 Pa. St., 33; Gray *v.* Baynard, 5 Del. Ch., 499.

<sup>45</sup> Karrer *v.* Berry, 44 Mich., 391, 6 N. W., 853.



§ 825. **Discharge of sewage as between municipal corporations.** A municipal corporation may be enjoined from discharging its sewage into the sewers of another municipality, such an injury being regarded as of so irreparable a nature as to warrant preventive relief in equity. It is proper, however, in such a case, to order that no steps be taken to enforce the injunction for a sufficient period to enable defendants to construct suitable works to discharge their sewage otherwise than into the sewers of plaintiffs.<sup>46</sup> And property owners in a city, who are entitled to the use of an underground drain to carry off the sewage from their premises, may enjoy the destruction of such drain.<sup>47</sup>

§ 825 *a*. **Erection of telegraph and telephone lines.** The construction of a line of telegraph poles and wires in front of plaintiff's premises in a city, when authorized by law, does not constitute a private nuisance of so irreparable a nature as to warrant relief by injunction.<sup>48</sup> So an injunction has been refused at the suit of a lot owner seeking to restrain a telephone company from stretching its wires in a street in front of plaintiff's premises, the question of plaintiff's right being doubtful and defendant claiming to act under legal authority.<sup>49</sup> Where, however, a telephone company, without authority and against the remonstrance of plaintiff, enters upon his premises and erects its poles thereon, it may be restrained, and the injunction may be granted in the mandatory form to compel the removal of the poles.<sup>50</sup>

§ 825 *b*. **Bridging of highway.** Since a city or other municipality ordinarily has no power to grant the use of its

<sup>46</sup> Commissioners of Kingstown v. Blackrock Commissioners, L. R. 10 Eq., 160.

<sup>47</sup> Masonic Temple Association v. Harris, 79 Me., 250, 9 Atl., 737.

<sup>48</sup> Hewett v. Western Union T. Co., 4 Mackey, 424. And see, *ante*, § 597 *f*.

<sup>49</sup> Roake v. American T. Co., 41 N. J. Eq., 35, 2 Atl., 618. See also New York & N. J. T. Co. v. East Orange, 42 N. J. Eq., 490, 8 Atl., 289.

<sup>50</sup> Broome v. New York & N. J. T. Co., 42 N. J. Eq., 141, 7 Atl., 851.

streets for purely private purposes, the construction, under an ordinance, of a bridge over a public highway connecting buildings located upon opposite sides constitutes a public nuisance, which may be abated by injunction in an action brought by adjoining or neighboring property owners who suffer a special and peculiar injury therefrom.<sup>51</sup>

§ 825 *c.* **City market place in highway.** The maintenance by a city of a public market place upon a public highway adjoining plaintiff's premises, resulting in noise and dirt and in foul and disagreeable odors, and causing great discomfort to the plaintiff, may be enjoined as a nuisance by one who is specially damaged thereby.<sup>52</sup>

<sup>51</sup> *Field v. Barling*, 149 Ill., 556, 49 Atl., 629, 52 L. R. A., 409, 86 37 N. E., 850, 24 L. R. A., 406; *Am. St. Rep.*, 441.

*Townsend v. Epstein*, 93 Md., 537, <sup>52</sup> *City of Richmond v. Smith*, 148 Ind., 294, 47 N. E., 630.

## VI. RAILWAYS.

- § 826. Construction of railway through city.
- 827. Plaintiff must show special injury.
- 828. Construction of railway in city not a nuisance *per se*; when relief granted.
- 829. Street railways; electric street railway.
- 830. Injunction conditioned on condemnation proceedings.
- 831. Opening street through railway embankment.
- 832. Construction of road for individual benefit.

§ 826. **Construction of railway through city.** The interest in and use of public streets being *publici juris*, their appropriation to private or corporate use in the construction of a railway, without authority of law, and the obstruction thus caused to travel, constitute a public nuisance, which may be enjoined in behalf of the people.<sup>1</sup> A city, however, in its corporate capacity, has not such a proprietary interest or right in the streets and public squares over which a railway is built as to entitle it to an injunction restraining the erection of the road.<sup>2</sup> And the construction of a railroad through a city by authority of the common council, will not be enjoined as a nuisance to adjacent property owners, the right of passage not being obstructed to the public for other purposes.<sup>3</sup>

§ 827. **Plaintiff must show special injury.** We have already seen that to warrant relief in equity by a private citizen against a public nuisance, some special injury must be shown aside from the general inconvenience to the public.<sup>4</sup> In other words, damage sustained in common by all the persons of a large class furnishes no foundation for relief on the part of an individual of that class. The rule

<sup>1</sup> *People v. New York & H. R. Co.*, 45 Barb., 73; *Attorney-General v. Greenville & H. R. Co.*, 59 N. J. Eq., 372, 46 Atl., 638.

<sup>2</sup> *Milwaukee v. Milwaukee & B. R. Co.*, 7 Wis., 85.

<sup>3</sup> *Drake v. Hudson River R. Co.*, 7 Barb., 508.

<sup>4</sup> § 762, *ante*.

applies with equal force in the case of railways, and the construction of a street railway will not be enjoined at the suit of an adjacent lot owner, who simply owns up to the line of the street, and over whose land the road does not pass, where no special damage is shown to the complainant different from that to all the property owners.<sup>5</sup> So when plaintiff seeks to enjoin a railway company from obstructing a street in a city, but his lands do not abut upon that part of the street where the alleged obstruction exists, he will not be allowed relief; since the injury or nuisance, if any, is to the public at large, and plaintiff suffering no injury different in kind from that sustained by the public is not entitled to an injunction.<sup>6</sup>

§ 828. **Construction of railway in city not a nuisance *per se*; when relief granted.** With regard to the interference of equity in restraint of the construction and operation of railroads, it is to be noticed in the first place that the construction of such roads and the running of cars through the streets of a city or village do not, *per se*, constitute such a nuisance as will be enjoined in the absence of proof that the railroad is a nuisance in fact.<sup>7</sup> Nor will a general averment that the road is a flagrant nuisance suffice in the absence of facts proving it to be such.<sup>8</sup> And the fact that the change in the mode of travel thus introduced in the street or thoroughfare may have had an injurious effect upon business or rents in such thoroughfare affords no ground for relief.<sup>9</sup> And where a railroad is authorized by the terms of its charter to construct its road in a particular manner, or through a par-

<sup>5</sup> *Osborne v. Brooklyn*, 5 Blatch., Long Island R. Co., 13 Barb., 646; 366. *Bell v. Ohio & P. R. Co.*, 25 Pa. St.,

<sup>6</sup> *Shaubut v. St. Paul & S. C. R.* 161.

*Co.*, 21 Minn., 502; *Gundlach v. Hamm*, 62 Minn., 42, 64 N. W., 8 Hentz v. Long Island R. Co., 13 Barb., 646.

50. And see, *ante*, § 757.

<sup>7</sup> *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289; *Hentz v.*

<sup>8</sup> *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289.

tiular street, such construction, being authorized by law, is not a nuisance and will not be enjoined.<sup>10</sup> Nor does the mere use of railway tracks across an alley in the rear of plaintiff's premises constitute such an injury as to warrant relief by injunction against the use of such tracks.<sup>11</sup> Even where the road is being built without authority of law, it will not be enjoined at the suit of one who owns no real estate over or adjoining which it is to pass, and who will not be specially injured by its construction.<sup>12</sup> But where the plaintiff owns real estate abutting upon a public street or alley and will be subjected to a special injury differing in kind from that suffered by the public, such as the impairment of his easement in the highway as a means of ingress and egress to his property, resulting in serious and substantial injury thereto, the rule is well settled that an injunction will lie to restrain the illegal and unauthorized construction of a railroad in the highway, as, for example, where the work is proceeding under an ordinance or license which the municipality has no power to grant.<sup>13</sup> And the fact that

<sup>10</sup> *Currier v. West R. Co.*, 6 Blatch., 487; *McFarland v. Orange & N. H. C. R. Co.*, 2 Beas., 17.

<sup>11</sup> *Baltimore & O. R. Co. v. Strauss*, 37 Md., 237.

<sup>12</sup> *Currier v. West R. Co.*, 6 Blatch., 487; *Davis v. Mayor*, 4 Kern., 506.

<sup>13</sup> *Louisville & N. R. Co. v. M. J. & K. C. R. Co.*, 124 Ala., 162, 26 So., 395; *Gustafson v. Hamm*, 56 Minn., 334, 57 N. W., 1054, 22 L. R. A., 565; *Glaessner v. A.-B. B. Assn.*, 100 Mo., 508, 13 S. W., 707; *Richi v. Chattanooga Brewing Company*, 105 Tenn., 651, 58 S. W. 646; *Knapp, Stout & Co. v. St. L. T. R. Co.*, 126 Mo., 26, 28 S. W., 627; *Schulenburg & B. L. Co. v. St. L. W. & N. R. Co.*, 129 Mo., 455, 31 S. W., 796; *Sherlock v. K. C. B. R.*

*Co.*, 142 Mo., 172, 43 S. W., 629, 64 Am. St. Rep., 551; *Corby v. C. R. I. & P. R. Co.*, 150 Mo., 457, 52 S. W., 282. In the first of these cases the city had no power, under its charter, to grant to a railroad the right to operate in a public highway. In the *Gustafson*, *Glaessner* and *Richi* cases the ordinances were void because they attempted to give the right to construct a railroad in the streets for purely private purposes. In the other cases the invalidity arose from the fact that they attempted to grant the exclusive right to the use of the highway. For a further discussion of the subject of injunctions against railroads in public highways, see *ante*, § 589.



the plaintiff is also operating a railroad in the highway under such an invalid ordinance will not justify the defendant in imposing such additional nuisance.<sup>14</sup>

§ 829. **Street railways; electric street railway.** It is also held that the construction of a street railway through the streets of a city, if the road is properly laid and operated, is not, *per se*, a public nuisance, since it is not an obstruction to the ordinary use of a street.<sup>15</sup> The construction, however, of a street railway through the streets of a city without authority of law has been treated as a nuisance. But when such construction is sought to be enjoined by another railway company, the relief will not be allowed except in so far as the plaintiff company shows that it sustains a special and peculiar injury, and the relief will be denied as to any injury which it sustains in common with the general public. To the extent, therefore, that it is attempted without authority of law to construct a street railway which will interfere with plaintiff's line of road in actual operation or in course of construction, defendant may be enjoined, but no further.<sup>16</sup> And a city which, under its charter, has control over the streets and highways within its limits, may enjoin the unauthorized laying of the tracks of a street railway company in its highways, as, for example, where the work is proceeding under an ordinance which is invalid for want of the necessary publication required by law.<sup>17</sup> And an abutting owner who suffers a special injury may restrain the tearing up of the highway adjacent to his premises for the purpose of constructing an electric street railway, upon the ground that the ordinance under which the work is being done is illegal.<sup>18</sup>

<sup>14</sup> Louisville & N. R. Co. v. M., Denver City R. Co., 2 Col., 673.

J. & K. C. R. Co., 124 Ala., 162,  
26 So., 895.

<sup>17</sup> Metropolitan City R. Co. v. City  
of Chicago, 96 Ill., 620.

<sup>15</sup> Coast Line R. Co. v. Cohen,  
50 Ga., 451.

<sup>18</sup> Hart v. Buckner, 5 C. C. A., 1,  
54 Fed., 925. Upon the general

<sup>16</sup> Denver & Swansea R. Co. v. subject of injunctions against elec-

§ 830. **Injunction conditioned on condemnation proceedings.** Where the facts as found by the court upon the hearing show that the operation of defendant's railroad in front of plaintiff's premises is in fact a nuisance, and defendant has made no compensation to plaintiff for the damages sustained, and has taken no proceedings for that purpose, it is proper to grant an injunction conditionally against the operation of the road, the injunction to issue if defendant does not forthwith institute and promptly carry forward proceedings for condemnation.<sup>19</sup>

§ 831. **Opening street through railway embankment.** When the corporate authorities of a city are proceeding to open a street through the embankment of a railway upon the ground that it constitutes a nuisance by obstructing the street, and the railway company, relying upon twenty years' possession, enjoins the municipal authorities from proceeding, the right of the city being doubtful, it is not error to continue the injunction until a hearing upon the merits. The question being properly triable by a jury, a court of equity will not assume its functions and decide the issue in advance of a trial at law.<sup>20</sup>

§ 832. **Construction of road for individual benefit.** Where one under contract with a railroad company which has failed to construct its road has gone on with the construction of a portion of the route for his own benefit, he may be restrained on the application of owners of land through which the road passes. And the fact that complainants in the bill in equity are plaintiffs in an action at law then pending against other parties, to recover damages for past trespasses thus incurred, affords no defense to the bill.<sup>21</sup>

tric railways in highways, see, *ante*, § 589 *b*.

<sup>19</sup> *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn., 215.

<sup>20</sup> *Mayor v. Georgia R. & B. Co.*, 40 Ga., 471.

<sup>21</sup> *Stewart & Foltz's Appeal*, 56 Pa. St., 413.

## VII. BRIDGES.

- § 833. Erection of bridge, when enjoined; jurisdiction of United States courts.
834. Illustrations of the relief.
835. When injunction refused.
836. Bridge in city, question of plaintiff's title.
837. Effect of acquiescence in construction.
838. Laying tramway over bridge enjoined.

§ 833. **Erection of bridge, when enjoined; jurisdiction of United States courts.** The erection of a bridge over a large navigable river in such manner as to obstruct seriously the navigation of the river is a public nuisance which will be enjoined in the courts of the United States, even though the erection be authorized by the legislature of a state.<sup>1</sup> And in such case the original jurisdiction of the Supreme Court of the United States will be exercised in behalf of a state bordering on a river, on the ground that the state, as proprietor of its public works, suffers a special injury from day to day by the erection of the bridge, which injury is not remediable at law and not susceptible of computation.<sup>2</sup> So the erection of a bridge and placing obstructions across a navigable river in such manner as to impede its free use and naviga-

<sup>1</sup> *Pennsylvania v. Wheeling & B. B. Co.*, 13 How., 518; *Baird v. Shore Line R. Co.*, 6 Blatch., 276; *Hatch v. Wallamet I. B. Co.*, 7 Sawy., 127; S. C., 6 Fed., 326. See S. C., 27 Fed., 673. But see *Cardwell v. American Bridge Co.*, 113 U. S., 205, 5 Sup. Ct. Rep., 423. In *Baird v. Shore Line R. Co.*, 6 Blatch., 276, complainant came within the rule requiring special injury to be shown, he having vessels engaged in the navigation of the river. But the erection being afterward au-

thorized by act of Congress, the injunction was dissolved.

<sup>2</sup> *Pennsylvania v. Wheeling & B. B. Co.*, 13 How. 518, Taney, C. J., and Daniel, J., dissenting. But the relief has been denied where the corporate authorities of a city sought to restrain the erection of an aqueduct causing an obstruction to a navigable river, on the ground that they suffered no special injury to themselves different from the general injury to the public. *Georgetown v. Alexandria*, 12 Pet., 91.

tion may be enjoined at the suit of a riparian owner.<sup>3</sup> But a riparian proprietor will not be allowed to restrain the erection of a bridge by authority of a state legislature, where the injury which he would sustain would be consequential only, the bridge being a matter of great public convenience, a similar one having been in use for many years over the stream a short distance above.<sup>4</sup> Nor will the jurisdiction be exercised upon a mere possibility of injury,<sup>5</sup> nor unless the proof clearly shows that the bridge would be an obstruction to the navigation of the river.<sup>6</sup> And the injunction will not be granted when complainant's right is doubtful and when it rests upon questions which are unsettled, and when no irreparable injury will ensue from a refusal to enjoin, since an important public work should not be enjoined unless the right to be protected is clear and without serious doubt.<sup>7</sup>

§ 834. **Illustrations of the relief.** Where complainant's right to the free navigation of a river is clear, and the court is in doubt whether the proposed bridge would be a material obstruction to navigation, a temporary injunction may be granted to prevent the great expenditure and loss which would result to the defendants if they were allowed to go on and erect the bridge before a hearing, and were then to be finally enjoined.<sup>8</sup> And the building of a bridge

<sup>3</sup> *Charleston & S. Ry. v. Johnson R. B. Co.*, 4 Blatch., 74, *infra*.  
son, 73 Ga., 306.

<sup>7</sup> *Pennsylvania R. Co. v. New*

<sup>4</sup> *Gilman v. Philadelphia*, 3 Wal., York & L. B. R. Co., 8 C. E. Green,  
713; the case distinguished from 157.

the *Wheeling Bridge* case, *supra*.

<sup>5</sup> *Mohawk Bridge Co. v. Utica & S. R. R. Co.*, 6 Paige, 554; *Northern Pacific R. Co. v. Barnesville & M. R. Co.*, 2 McCrary, 224; S. C., 4 Fed., 172; *City of St. Louis v. The Knapp, Stout & Co. Company*, 2 McCrary, 516; S. C., 6 Fed., 221.

<sup>6</sup> *Hutchinson v. Thompson*, 9 Ohio, 52. But see *Silliman v. Hud-*

<sup>8</sup> *Silliman v. Hudson R. B. Co.*, 4 Blatch., 74. This case on final hearing is reported in 4 Blatch., 395, before Nelson and Hall, JJ., and the judges being divided in opinion as to whether the injunction should be made perpetual, it was so certified to the Supreme Court of the United States, and upon the points so certified the

over a navigable river, without authority of law, in such manner as to entirely obstruct the navigation of the river, is such a public nuisance as to warrant relief by injunction. And a riparian owner who suffers a special injury thereby in the use of a warehouse upon his premises, which is used in connection with the navigation of the river, is entitled to restrain the building of such bridge without a draw and in such manner as to obstruct navigation.<sup>9</sup> So the construction of a bridge without lawful authority over a stream in the line of a public highway, in such manner as to permanently interfere with and deprive plaintiffs of the lawful use and enjoyment of their mill property adjacent thereto, is such a nuisance of a public nature as to justify an injunction in behalf of plaintiffs who show themselves to be peculiarly and specially injured by such erection.<sup>10</sup>

§ 835. **When injunction refused.** When a bridge over a navigable water is being built in conformity with the constitution and laws of the United States, and the state in which it is being erected, has sanctioned its construction in the manner provided by the laws of the United States, it will not be regarded as a public nuisance, nor will its construction be interfered with by injunction.<sup>11</sup> Nor will an interlocutory injunction be granted to restrain the building of a bridge over a navigable river when it is not shown that it will materially obstruct or hinder commerce upon the

judges of that court were also equally divided. See 1 Black, 582. The court below then decreed the dismissal of the bills, from which decrees appeals were had to the Supreme Court of the United States and upon the hearing of the appeals the judges of that court were again equally divided. See 2 Wal., 403. As the result of this division the decrees of the circuit court were affirmed.

<sup>9</sup> *Hickok v. Hine*, 23 Ohio St., 523; *Hatch v. Wallamet Iron B. Co.*, 7 Sawy., 127; S. C., 6 Fed., 326. See S. C., 27 Fed., 673. But see *Cardwell v. American Bridge Co.*, 113 U. S., 205, 5 Sup. Ct. Rep., 423.

<sup>10</sup> *Potter v. Village of Menasha*, 30 Wis., 492.

<sup>11</sup> *Miller v. Mayor*, 13 Blatch., 469.



river, or cause injury to navigation, such a case not being one of an interference with commerce among the states which will justify equity in prohibiting the erection.<sup>12</sup>

§ 836. **Bridge in city, question of plaintiff's title.** Equity will not enjoin the construction by municipal officers, under legislative authority, of a bridge over a branch or channel of tide water in a city, upon the complaint of a riparian owner having no title to the land covered by the water over which the bridge is being erected, and whose only claim of right to the water is the general right or easement of navigation which he shares in common with the public.<sup>13</sup> But where plaintiffs have title derived from the state to the land under the water over which a bridge is to be erected, they may enjoin the authorities of a city from erecting such bridge without having made compensation or taken the necessary proceedings for condemning the land.<sup>14</sup>

§ 837. **Effect of acquiescence in construction.** The doctrine of acquiescence as a bar or estoppel to equitable relief is applicable to the class of cases under discussion, as indeed to most cases in which the extraordinary aid of equity is invoked. And where the defendant, under a franchise granted by the legislature, has been engaged in the construction of a bridge for more than a year, and until the work is almost completed, and has made and incurred large expenditures, with full knowledge upon the part of the persons who might be affected by such bridge, such acquiescence and delay may prevent relief by injunction *in limine*. And while as against the public, represented by the attorney-general seeking to enjoin a nuisance, a stronger case of delay or acquiescence is required to pre-

<sup>12</sup> Silliman v. Troy Bridge Co., 11 Blatch., 274.

<sup>14</sup> Morris Canal & B. Co. v. Mayor, 11 C. E. Green, 294.

<sup>13</sup> Sugar Refining Co. v. Mayor, 11 C. E. Green, 247.

vent relief than when a private right alone is in dispute, the doctrine of acquiescence may yet be applied in such a case, even as against the public.<sup>15</sup> So when an alleged public nuisance which it is sought to enjoin consists in the erection by a railway company of a bridge over a river, and defendant, acting in good faith and under a belief that it has sufficient legislative authority, has expended a large sum of money in its enterprise, and has been permitted to go on without objection for nearly a year, and until the work has almost reached completion, an injunction will be refused even upon an information filed in behalf of the state, and the state will be left to seek a remedy at law.<sup>16</sup>

§ 838. **Laying tramway over bridge enjoined.** The laying of a tramway over a bridge for the purpose of transporting coals may be enjoined, when defendants, in an action at law brought against them for damages, have entered into an undertaking not to repeat the act in question.<sup>17</sup>

<sup>15</sup> Attorney-General *v.* New York & B. B. R. Co., 12 C. E. Green, 1. & L. B. R. Co., 9 C. E. Green, 49.      <sup>17</sup> North Canal Co. *v.* Ynisarwed

<sup>16</sup> Attorney-General *v.* Delaware Co., L. R. 10 Ch., 450.

## VIII. MILL-DAMS.

- § 839. The rule stated and illustrated; limitations upon the doctrine.  
 840. Value of property not a test; right need not be established by action at law.  
 841. Rebuilding of dam; destruction of dam.  
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 843. Erection of dam prohibited by law.  
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 845. The same.  
 846. Writ for removal of dam not enjoined.  
 847. Adverse user by defendants; laches of plaintiff.  
 847a. Injunction until payment of award.

§ 839. **The rule stated and illustrated; limitations upon the doctrine.** The erection of a mill-dam in such manner that the inundation caused by the back flowage of the water lessens the value of complainant's land, destroys his timber and imperils the health of the neighborhood, will be enjoined.<sup>1</sup> So if a dam is erected below complainant's land, and so near that the back flowage covers it and prevents its use, equity will interfere.<sup>2</sup> So, too, the threatened destruction of a mill-dam and the drawing off of the water are injuries over which equity will exercise its restraining jurisdiction where it is made to appear that irreparable mischief would otherwise result. And it is to be observed that the jurisdiction is exercised, not in derogation of the remedy at law,

<sup>1</sup> *White v. Forbes*, Walk. (Mich.), 112; *Whitfield v. Rogers*, 26 Miss., 84. And see *Robinson v. Byron*, 1 Bro. C. C., 588; *Troe v. Larson*, 84 Iowa, 649, 51 N. W., 179, 35 Am. St. Rep., 336.

<sup>2</sup> *Miner v. Nichols*, 24 R. I., 199, 52 Atl., 893; *Bemis v. Upham*, 13 Pick., 169; *Stone v. Roscommon Lumber Co.*, 59 Mich., 24, 26 N. W., 216. And this, even though under a statute of the state a rem-

edy might have been had at law as for a nuisance, the court holding that under a general statute authorizing courts of equity to hear and determine any matter touching waste or nuisance in which there was not a plain and adequate remedy at law, equity was entitled to jurisdiction in the case, the legal remedy being insufficient. *Bemis v. Upham*, 13 Pick., 169.

but rather because the legal remedy is insufficient, and because of the danger of irreparable mischief before it can be applied.<sup>3</sup> It is therefore proper to retain an interlocutory injunction restraining the threatened erection of a mill-dam, until the determination of an issue to be tried by a jury as to whether the erection of the dam will probably endanger the health of the neighborhood, and whether plaintiff will be thereby materially injured in the enjoyment of his property and in the health of himself and family.<sup>4</sup> And an injunction will lie to prevent the damming up of a bayou or natural outlet, which serves as a drain to plaintiff's land, the result of which would greatly injure plaintiff by flooding his land.<sup>5</sup> So the maintenance of a dam which results in the accumulation of decaying vegetable matter which endangers the life and health of the plaintiff and his family will be enjoined.<sup>6</sup> But to justify relief against overflows resulting from dams, it must appear that the plaintiff suffers injury as the result of the dam which otherwise he would not suffer. Where, therefore, he is unable to show that lands of his are submerged in consequence of the nuisance complained of, which, without it, would not be submerged, the relief should be denied.<sup>7</sup> Nor will the injunction be granted in such case on the ground that the water accumulated by the dam will become foul and stagnant, thereby endangering the health of the neighborhood, where such injury does not in fact exist and is merely apprehended.<sup>8</sup>

§ 840. **Value of property not a test; right need not be established by action at law.** Where an injunction is sought to prevent interference with the enjoyment of property by the erection of a dam, equity will not

<sup>3</sup> *Winnipiseogee Lake Co. v. Worster*, 29 N. H., 433, and cases cited. <sup>6</sup> *Richards v. Daugherty*, 133 Ala., 569, 31 So., 934.

<sup>7</sup> *Esson v. Wattier*, 25 Ore., 7, 34

<sup>4</sup> *Ogletree v. McQuaggs*, 67 Ala., 580. <sup>5</sup> *Pac.*, 756.

<sup>8</sup> *Id.*

<sup>6</sup> *Learned v. Hunt*, 63 Miss., 373.

be governed by the mere value of the property.<sup>9</sup> Nor will the relief be denied because complainant's title has not been established in an action at law, since the modern doctrine of courts of equity in this respect is much more liberal than the ancient, and the rule requiring the right to be first established at law prevails only in cases where the right itself is in dispute or is doubtful.<sup>10</sup> Therefore a bill to enjoin the further construction and maintenance of a mill-dam is not demurrable for want of equity in that it contains no allegations of complainant's right having been established in a suit at law.<sup>11</sup>

§ 841. **Rebuilding of dam; destruction of dam.** The rebuilding of a dam will be enjoined where, before it was swept away, its stagnant waters had proved so injurious to the neighborhood that an adjacent owner had recovered damages for the injury sustained.<sup>12</sup> And a municipal corporation may be restrained from destroying without trial or notice, a mill-dam authorized by statute, on a stream declared to be a public highway, on the ground that it is a nuisance. The injury threatened by the corporate authorities being permanent to the freehold, under a claim of right which is unfounded, and it being doubtful whether adequate compensation can be made in damages, an injunction is the proper remedy.<sup>13</sup>

§ 842. **Dissolution; allegation should be specific; verdicts against mill owner.** A temporary injunction, granted *ex parte* at the suit of the owner of a mill-dam, to restrain a

<sup>9</sup> White v. Forbes, Walk. (Mich.), 112.

<sup>10</sup> Sprague v. Rhodes, 4 R. I., 301; White v. Forbes, Walk. (Mich.), 112. And see, *ante*, §§ 698, 740.

<sup>11</sup> Sprague v. Rhodes, 4 R. I., 301; Switzer v. McCulloch, 76 Va., 777. And it is also held in Sprague v. Rhodes, 4 R. I., 301, al-

though it would appear to be contrary to the weight of authority, that such a bill is not demurrable in failing to state a case of irreparable mischief.

<sup>12</sup> Miller v. Truehart, 4 Leigh, 569. See also De Vaughn v. Minor, 77 Ga., 809, 1 S. E., 433.

<sup>13</sup> Clark v. Mayor, 13 Barb., 32.



town from opening certain sluice-ways in the dam, will be dissolved when it appears that its dissolution will not result in any loss to complainant which can not be repaired in damages, or that the dissolution will not affect the cause in a trial on the merits.<sup>14</sup> And a mere general and indefinite suggestion of irreparable mischief is not sufficient to warrant the interposition of equity, but there must be an allegation of some distinct and sufficient ground of such mischief.<sup>15</sup> And the fact of two verdicts having been recovered at law against a mill owner for keeping his dam too high, will not authorize an injunction restraining him from re-building it at all.<sup>16</sup>

§ 843. **Erection of dam prohibited by law.** Where the laws of a state expressly prohibit the erection of any dam or other obstruction over a navigable river, an injunction will be allowed to prevent the erection without legislative authority of a dam in such manner as to obstruct the free use and navigation of the river. And in such case, a company incorporated for the improvement of the river, which suffers a damage in the loss of tolls by the obstruction, sustains such a peculiar and special injury as to render it a proper plaintiff to institute the action.<sup>17</sup>

§ 844. **The general doctrine further illustrated.** Equity will not, however, enjoin the erection of a dam and the overflowing of land upon the ground of injury to the public health, upon the application of private citizens who show no injury to their health by the proposed erection, but only an injury to their lands.<sup>18</sup> Nor will the continuance of a mill-dam be restrained upon the ground that it renders plaintiff's residence unhealthy, when it does not clearly appear that the injury is irreparable, or that it can not

<sup>14</sup> *Wing v. Fairhaven*, 8 Cush., 363.

<sup>16</sup> *Id.*

<sup>15</sup> *Talley v. Tyree*, 2 Rob. (Va.), 500.

<sup>17</sup> *Wisconsin River Improvement Co. v. Lyons*, 30 Wis., 61.

<sup>18</sup> *Vail v. Mix*, 74 Ill., 127.

be compensated in damages.<sup>19</sup> And when it is sought to restrain the construction of a dam over a navigable river upon the ground that it will obstruct navigation, the work being in the nature of a public improvement authorized by an act of legislature, equity will not enjoin its construction merely upon theoretical opinions as to the injury, or upon the theory of plaintiff's bill that no dam can be constructed at the place in question without obstructing the navigation of the river.<sup>20</sup> Nor will the construction of a dam over a river be enjoined upon the ground that the statute authorizing its construction does not provide compensation for lands which may be overflowed, when it is not shown that any lands will be overflowed as the result of such construction.<sup>21</sup> And when the alleged nuisance consists in the erection of a dam below plaintiff's mill in such manner as to back up the water and to obstruct the wheel of plaintiff's mill, an injunction will be withheld when a full and adequate legal remedy is provided by the laws of the state.<sup>22</sup> And an injunction against the erection of a mill-dam has been refused when its effect would be to work a forfeiture of the charter and franchise under which defendants were operating.<sup>23</sup>

§ 845. **The same.** Upon a bill charging that defendant by erecting a dam across his stream has caused the water to overflow plaintiff's land situated farther up the stream, it is improper to enjoin defendant *in limine* from raising his dam higher when no such intention is charged or shown upon the part of defendant. Nor should the court, by its interlocutory injunction in such case, prevent defendant from protecting his dam from destruction by high water or otherwise, when

<sup>19</sup> Thomas v. Calhoun, 58 Miss., 80.

<sup>20</sup> Woodman v. Kilbourn Manufacturing Co., 1 Bissell, 546.

<sup>21</sup> State v. City of Eau Claire, 40 Wis., 533.

<sup>22</sup> Burnett v. Nicholson, 72 N. C., 334.

<sup>23</sup> Ottaquechee W. Co. v. Newton, 57 Vt., 451.

it is not shown that he is insolvent, or that plaintiff is likely to sustain an injury which would be irreparable in damages.<sup>24</sup> And it would seem that a preliminary injunction restraining the erection of a dam in such manner as to overflow plaintiff's land should not be so framed as to alter the condition of defendant's dam at the time of filing the bill of complaint, but should be limited in its operation to restraining any further erection or obstruction.<sup>25</sup>

§ 846. **Writ for removal of dam not enjoined.** When the owner of a mill-dam seeks to enjoin a sheriff from executing a writ to remove so much of the dam as may be necessary to prevent the water from flooding certain premises, such writ being issued in pursuance of a prior judgment against the former owners of the dam finding it to be a nuisance and directing the removal of so much of the dam by the sheriff as may be necessary for the purpose named, it is not error to refuse a preliminary injunction against the enforcement of the writ.<sup>26</sup> And an injunction will not lie to restrain municipal authorities from abating a mill-dam as a nuisance, when they have full authority so to do; especially when, before the filing of the bill, the dam is swept away by a flood, there being nothing left for the court to enjoin.<sup>27</sup>

§ 847. **Adverse user by defendants; laches of plaintiff.** To a bill by land owners seeking to restrain the erection of a mill-dam in such manner as to flow back the water upon plaintiff's land, it is a sufficient answer that defendants and their grantors had for fifty years prior thereto continuously enjoyed and used the right to flow the water back upon plaintiff's lands by such a mill-dam, such user being adverse and under a claim of ownership.<sup>28</sup> Nor will an injunction be allowed to restrain the overflow and settling

<sup>24</sup>Wheeler v. Steele, 50 Ga., 34.

<sup>27</sup>Mayor v. Mitchell, 79 Ga., 807,

<sup>25</sup>Tatem v. Gilpin, 1 Del. Ch., 13. 5 S. E., 201.

<sup>26</sup>Akin v. Davis, 14 Kan., 143.

<sup>28</sup>Ogle v. Dill, 55 Ind., 130.

back of water by the erection of a dam where the person aggrieved has for a long period lain upon his rights and permitted the dam to be several times rebuilt without objection, since he has been guilty of such laches as to entitle him to no consideration in a court of equity.<sup>29</sup>

§ 847 *a*. **Injunction until payment of award.** Where an award has been made to complainant for damages resulting in injury to his land arising from the erection of a dam and the overflowing of the water, the use and maintenance of the dam may be enjoined until the amount of the award is paid.<sup>30</sup>

<sup>29</sup> *Sheldon v. Rockwell*, 9 Wis., 166, a delay of nineteen years; *Cobb v. Smith*, 16 Wis., 661, a delay of ten years.

<sup>30</sup> *Wilmington Water Power Co. v. Evans*, 166 Ill., 548, 46 N. E., 1083; *Ackerman v. Horicon Iron Mfg. Co.*, 16 Wis., 151.

## CHAPTER XIV.

### OF INJUNCTIONS FOR THE PROTECTION OF EASEMENTS.

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#### I. LEADING PRINCIPLES.

- § 848. Jurisdiction analogous to that in nuisance.
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§ 848. **Jurisdiction analogous to that in nuisance.** The general principles on which the jurisdiction of equity to restrain the violation of easements is based are similar to those which constitute the foundation of the relief against nuisances. Indeed, so closely allied are the two subjects that it is difficult to draw the line between what constitutes a violation of an easement and what a nuisance. In a generic sense every violation of an easement may be considered as a nuisance, although the converse of the proposition does not hold true. In both cases, to warrant the interposition of equity, an irreparable injury must be made to appear, which is not susceptible of adequate compensation in pecuniary damages, or which, from the nature of the case, would occasion a constantly recurring griev-



ance, such as loss of health, trade, business, or destruction of means of subsistence.<sup>1</sup>

§ 849. **General rule; right by prescription.** It may be stated as a general rule that where an easement or servitude is annexed or pertains to a private estate, either by grant, covenant or prescription, any encroachment upon the quiet enjoyment and exercise will be prevented by injunction.<sup>2</sup> Thus, where one has sold a lot adjoining his private residence on condition that it shall not be used in any manner offensive to the original owner, any violation of this covenant will be restrained.<sup>3</sup> And where the easement is acquired by prescriptive use for a long period of years, it is as much entitled to protection in equity as though resulting from grant or covenant.<sup>4</sup> And plaintiff who has long enjoyed and used an easement consisting in the right to drain the surplus water upon his premises through and over defendant's premises may enjoin an obstruction of the right.<sup>5</sup> So acquiescence for twenty years in defendant's use and enjoyment of the right will prevent complainant from enjoining such use.<sup>6</sup> But where the right or easement is based upon prescription, it must be shown to have been in exclusion of the rights of others. Thus, where complainant relies on twenty years adverse user and enjoyment of a fishery in a navigable river to restrain defendant from interfering with his easement by the erection of a wharf and running steamboats, the absence of an averment in the bill

<sup>1</sup>Webber v. Gage, 39 N. H., 182. 31, 29 N. E., 11; Yeager v. Manning, 183 Ill., 275, 55 N. E., 691.  
and cases cited. And see Sanderlin v. Baxter, 76 Va., 299. See, <sup>3</sup>Seymour v. McDonald, 4 Sandf. Ch., 502.

<sup>2</sup>Webber v. Gage, 39 N. H., 182; <sup>4</sup>Hulme v. Shreve, 3 Green Ch., 116. And see Shreve v. Voorhees, 2 Green Ch., 25.

Seymour v. McDonald, 4 Sandf. Ch., 502; Hulme v. Shreve, 3 Green Ch., 116; Hills v. Miller, 3 Paige, 254; Trustees v. Cowen, 4

<sup>5</sup>Sanderlin v. Baxter, 76 Va., 299.  
<sup>6</sup>Haight v. Morris Aqueduct, 4 Wash. C. C., 601.

that such use was in exclusion of all others will be fatal to complainant's case.<sup>7</sup>

§ 850. **Easement must be certain and violation of right clear.** To authorize the interference in this class of cases the easement should be itself certain and capable of being clearly ascertained, and there should be a clear and palpable violation of the right.<sup>8</sup> And where only a possible injury to complainant's easement is shown, as in the erection of a wharf where it does not appear that his property rights will be violated, and where such injury as may result can be remedied at law, an injunction will not be allowed.<sup>9</sup> Nor will the owner of real estate be restrained from making reasonable improvements, such as the erection of buildings, on the ground of endangering a neighboring edifice, if the owner of the adjacent premises possesses no special privileges protecting him from such erections, either by prescription or by grant from the person making the improvement, or from those under whom he claims title.<sup>10</sup>

§ 851. **Covenants against erections will be enforced.** A covenant in a conveyance not to erect or permit the erection of any buildings on the premises of the grantor in front of the premises conveyed is the grant of an easement, and the grantee is entitled to an injunction to restrain the owner of the servient estate from the erection of buildings in violation of his covenant.<sup>11</sup> And where the vendee of land has purchased upon the strength of repre-

<sup>7</sup> *Delaware v. Stump*, 8 Gill & J., 479.

<sup>8</sup> *Olmstead v. Loomis*, 6 Barb., 162; *Howell Co. v. Pope Glucose Co.*, 171 Ill., 350, 49 N. E., 497.

<sup>9</sup> *Taylor v. Brookman*, 45 Barb., 106.

<sup>10</sup> *Lasala v. Holbrook*, 4 Paige, 169.

<sup>11</sup> *Hills v. Miller*, 3 Paige, 254;

*Trustees v. Cowen*, 4 Paige, 510.

For a case where an injunction was refused, when sought to restrain defendants from selling for building purposes an estate over which plaintiff had a right of shooting for a term of years, see *Pattisson v. Gilford*, L. R. 18 Eq., 259.

sentations made by the vendor that an alley should be established and perpetually maintained to a piece of land adjacent, even though the representations were not made in writing, the obstruction of such right of way will be perpetually enjoined.<sup>12</sup> So the grantee of real estate may be restrained from the violation of covenants on his part against erections upon the premises conveyed. And where real estate is sold, with covenants by the grantee that no buildings shall be erected thereon, and passes through successive hands, the final owner in fee with notice of such covenants will be enjoined from violating the agreement by erecting buildings contrary to its terms.<sup>13</sup> So a covenant in a conveyance that neither the grantee nor any persons claiming under him shall erect upon the premises conveyed buildings exceeding a specified depth confers such an easement upon the grantor, or those claiming the title to adjacent premises under him, as to warrant relief by injunction against a violation of the covenant.<sup>14</sup>

§ 852. **Easement in lateral support.** The relief will be extended for the protection of an easement to support where defendant's acts tend to the destruction of the right. Thus, the owner of one-half of an ancient solid party-wall has been enjoined from removing a portion thereof, and erecting a new wall on his own land at a distance of two inches from that left standing, the original wall having been long used for the support of buildings on either side.<sup>15</sup> In the absence, however, of some contract or obligation to the contrary an easement in a party-wall between adjacent premises continues only so long as the buildings continue, and upon their destruction by fire one of the parties may restrain the

<sup>12</sup> *Trueheart v. Price*, 2 Munf., 468.

<sup>14</sup> *Lattimer v. Livermore*, 72 N. Y., 174.

<sup>13</sup> *Mann v. Stephens*, 15 Sim., 377. And see *Seymour v. McDonald*, 4 Sandf. Ch., 502.

<sup>15</sup> *Phillips v. Bordman*, 4 Allen, 147.

other from replacing or using the wall.<sup>16</sup> But a land owner is entitled to have his land in its natural state supported by the adjoining land of his neighbor, and this right may be protected by injunction in a proper case.<sup>17</sup> And where defendant, by mining operations upon his own premises, adjacent to those of plaintiff, has endangered the walls and lateral support of plaintiff's house, he may be enjoined from working under plaintiff's land, or within his own boundary in such manner as to occasion any subsidence or alteration of the surface of plaintiff's land.<sup>18</sup> If, however, the substantial controversy is as to the real dividing line between the two parcels of land, relief by injunction will be denied, leaving the parties to their remedy at law.<sup>19</sup> So the construction of drains and ditches upon one's own lot, so as to conduct the water accumulating thereon to and against the wall of a building upon an adjacent lot, in such manner as to weaken the wall and render it dangerous and unsafe, may be enjoined. For, while the owner of an upper lot has a natural easement or servitude in an adjoining and lower lot to the extent of the natural flow of water from the upper to the lower lot, he has no right to increase that servitude by leading in more water to the injury of the lower lot.<sup>20</sup> But the fact that the eaves of a house project over an adjoining lot to such an extent as to throw the water from the roof upon such lot will not justify an injunction, when it does not appear that irreparable injury will follow.<sup>21</sup>

· § 853. **Right of burial.** The right of burial in a church yard, though conveyed by grant, is nevertheless considered as an easement rather than a title to the freehold, and an injunction will not be allowed the owner to prevent such

<sup>16</sup> *Hoffman v. Kuhn*, 57 Miss., 746.

<sup>19</sup> *Wykes v. Ringleberg*, 49 Mich., 567.

<sup>17</sup> *Hunt v. Peake, John.*, 705;  
*Trowbridge v. True*, 52 Conn., 190.

<sup>20</sup> *Goldsmith v. Elsas*, 53 Ga., 186.  
<sup>21</sup> *Cherry v. Stein*, 11 Md., 1.

<sup>18</sup> *Hunt v. Peake, John.*, 705.

disposal of the soil and removal of the remains interred therein as the court may have ordered on application of the officers of the church.<sup>22</sup>

§ 854. **Action of trespass.** The owners of an easement will not be allowed to restrain the owner of the servient estate from proceeding in an action of trespass, where the grounds of defense to the action are partly legal and partly equitable, but the action at law will be allowed to proceed. In such case, if the legal grounds relied upon in defense are maintained in the action at law, no proceedings in equity are necessary; while if they are not sustained and it afterward becomes necessary for a court of equity to take cognizance of the equitable questions involved, the court will know what amount of damages has been assessed by the jury in the trial at law, and will thereby be better enabled to secure that which has been decided at law to be full compensation for the easement.<sup>23</sup>

§ 855. **Public squares.** The right which it is sought to protect by injunction may result from a dedication of land to public uses, as well as from express grant or adverse possession. Thus, where land has been dedicated to the use of the public as a public square, the owners of lots adjoining the square who have purchased their lots and made improvements, relying upon such dedication to the public use, are entitled to the aid of equity to restrain the erection of private buildings on the square,<sup>24</sup> or to restrain the enclosure of a portion of the square for private uses,<sup>25</sup> or to restrain its unauthorized sale.<sup>26</sup> And where the proprietors of lands in laying off a town have dedicated a block of

<sup>22</sup> *Richards v. Northwest P. D. v. Auten*, 77 Ill., 325. And see, Ct., 32 Barb., 42. *post*, § 1275.

<sup>23</sup> *Barnard v. Wallis*, 1 Cr. & Ph., 85.

<sup>25</sup> *Wheeler v. Bedford*, 54 Conn., 244, 7 Atl., 22.

<sup>24</sup> *Rutherford v. Taylor*, 38 Mo., 315. And see *Brown v. Manning*, 6 Ohio, 298; *Village of Princeville*

<sup>26</sup> *Cummings v. City of St. Louis*, 90 Mo., 259, 2 S. W., 130.



ground to the use of the public as a public square, intended for the convenience and pleasure of the inhabitants, and the corporate authorities of the town or village have acquiesced in its use for such purposes for many years, they may be enjoined from diverting such square from its proper use by the erection of a town hall thereon.<sup>27</sup> So purchasers of lots fronting upon a square which was dedicated by the original owner to the public use for a court house, having purchased upon the faith of such dedication, may restrain the county authorities from diverting the square to a use not contemplated by the original dedication, such as the erection of a jail thereon.<sup>28</sup> So where land has been dedicated to a city for use as a public park, to be kept at all times free of buildings, and the dedication has been accepted, the city takes title subject to a perpetual trust in favor of the public and will be enjoined at the instance of an abutting owner from erecting buildings in violation of the terms of the dedication.<sup>29</sup> So where an injunction had been granted to restrain defendant from interfering with land alleged to have been dedicated to the use of the public, and it appeared that the land had been so used by the public for many years, and defendant by his answer showed no satisfactory title to the premises, it was regarded as proper to continue the injunction until the hearing.<sup>30</sup> Nor will the original proprietors, who have dedicated land to be used as a public square, afterward be allowed to appropriate it to their own private use, and an adjacent lot owner is a proper party complainant to a bill in equity to enjoin such appropriation. Such a complainant, being one of the inhabitants of the town and holding property contiguous to the square, is not a mere volunteer assuming to protect the

<sup>27</sup> *Village of Princeville v. Auten*, Ill., 392, 48 N. E., 927, 38 L. R. A., 77 Ill., 325. 849, 61 Am. St. Rep., 185.

<sup>28</sup> *County of Harris v. Taylor*, 58 Tex., 690. <sup>30</sup> *Trustees v. Gray*, 12 C. E. Green, 278.

<sup>29</sup> *City of Chicago v. Ward*, 169

rights of others, but is injured in his individual rights, and is entitled to the aid of equity to protect his own interests.<sup>31</sup> Where, however, the owners of adjacent lots sustain no injury to their individual rights, equity will not interfere. Thus, where a square has been conveyed to a county for the erection of public buildings and a court house, adjacent lot owners will not be permitted to restrain the county commissioners from leasing portions of the ground for private purposes, reserving the rent to the county, complainants in such case being regarded merely as volunteers having no personal interests to be protected.<sup>32</sup>

§ 856. **Dedication for burial ground and school house.**

Where land has been dedicated to the public use for certain specified purposes, an injunction will not usually be allowed to prevent the carrying out of such purposes. Thus, the owner of lands having dedicated a portion of them during his life-time for a burial ground and school house lot, his heir, who is a non-resident, will not be allowed to enjoin the rebuilding of a school house upon the premises in question. Under such circumstances the erection of a new school house upon that part of the ground dedicated to school purposes is no encroachment upon the dedication, and it is error to enjoin its erection.<sup>33</sup>

§ 857. **Protection to dowress.** The aid of an injunction has been granted for the protection of the interest of a dowress in easements appurtenant to real property allotted to her for her dower. Thus, where a widow received as her dower a portion of a building consisting of several stores in a city, and the owners of the remaining stores in the same building, deriving their title under the will of the deceased husband, were about to tear down their portion

<sup>31</sup> *Brown v. Manning*, 6 Ohio, 298.

<sup>33</sup> *Pott v. School Directors*, 42 Pa.

<sup>32</sup> *Smith v. Heuston*, 6 Ohio, 101. St., 132.

And see *Putnam v. Valentine*, 5 Ohio, 187.

of the general building for the purpose of erecting better improvements, thereby depriving the widow of the use of a stairway necessary to reach the upper stories of her portion of the building, and depriving her of a sky-light necessary for lighting the upper floors, an injunction was allowed for the protection of the easements in question.<sup>34</sup>

§ 858. **Removal of signs.** Equity will not, however, interfere by injunction in this class of cases, when it is not satisfactorily shown that the proposed interference with plaintiff's easement would be unreasonable or vexatious. Thus, where plaintiff had a perpetual easement in the use of a stairway between his building and that of defendant, and sought to enjoin defendant from tearing down or removing any signs that plaintiff or his tenants might place on the stairway, the relief was refused, upon the ground that the court could not determine in advance whether a proposed sign would be reasonable or unreasonable.<sup>35</sup>

<sup>34</sup> *Morrison v. King*, 62 Ill., 30.

<sup>35</sup> *Bennett v. Seligman*, 32 Mich., 500.

## II. EASEMENTS IN LIGHT.

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§ 859. **The general doctrine stated.** In England the preventive jurisdiction of equity is frequently called into exercise for the purpose of protecting easements in ancient lights which have been long enjoined, and the right to the uninterrupted use and enjoyment of such lights is freely protected by injunction.<sup>1</sup> In cases of this nature, equity

<sup>1</sup> *Staight v. Burn*, L. R. 5 Ch., 163; *Theed v. Debenham*, 2 Ch. D., 165; *Potts v. Levy*, 2 Drew., 272; *Simper v. Foley*, 2 John. & H., 555; *Gale v. Abbott*, 8 Jur. N. S., 987; *Maguire v. Grattan*, I. R. 2 Eq., 246; *Kelk v. Pearson*, L. R. 6 Ch., 809; *Beadel v. Perry*, L. R. 3 Eq., 465; *Martin v. Headon*, L. R. 2 Eq., 425; *Dent v. Auction Mart Co.*, L. R. 2 Eq., 238; *Weston v. Arnold*, L. R. 8 Ch., 1084; *Dyers Company v. King*, L. R. 9 Eq., 438; *Leech v. Schweder*, L. R. 9 Ch., 463; *Martin v. Price*, 63 L. J. N. S. Ch., 209; *Home & Colonial Stores v. Colls*, (1902) 1 Ch., 302; *Cowper v. Laidler*, (1903) 2 Ch., 337. It should, however, be ob-

served, that in England the right to equitable relief for the protection of ancient lights is to a considerable extent dependent upon the Statute, 2 and 3 Wm. IV., Ch. 72, § III, which provides as follows: "And be it further enacted, that when the access and use of light to and for any dwelling house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agree-

proceeds upon the principle that when there is a material and substantial injury to a clear, legal right and when from the nature of the case damages would not afford a complete compensation, it is proper to interfere by injunction.<sup>2</sup> And where defendant is encroaching upon plaintiff's ancient lights by building upon adjacent premises, if plaintiff's title be admitted, the relief may be allowed without requiring him to try his right at law.<sup>3</sup> It is not, however, every deprivation of ancient lights that will authorize the interference by injunction, nor is the diminution of the value of the premises by the erection of buildings so as to darken one's windows alone a sufficient ground, nor the fact that an action on the case would lie for the damages resulting from such diminution. To warrant the relief there must be such material injury to the comfort of those dwelling in the neighboring house as requires the exercise of a preventive as well as a remedial power.<sup>4</sup> And where it is not shown that the ob-

ment expressly made or given for that purpose by deed or writing." As to the right to relief under a statute authorizing an injunction against the malicious erection by an owner or lessee of land of any structure thereon intended to annoy or injure any proprietor of adjacent land in respect to his use or disposition of the same, see *Harbison v. White*, 46 Conn., 106.

<sup>2</sup> *Staight v. Burn*, L. R. 5 Ch., 163.

<sup>3</sup> *Potts v. Levy*, 2 Drew., 272.

<sup>4</sup> *Attorney-General v. Nichol*, 16 Ves., 338. The general principles underlying the jurisdiction of equity to interfere for the protection of easements in lights are well laid down by Lord Eldon in this case as follows: "The foundation of this jurisdiction, interfering by injunction, is that head of mischief

alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighboring house requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law. The position of the building, whether opposite, at right angles or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and can not erect without those mischievous consequences, which upon equitable principles should be not only compensated by damages, but prevented by injunction. \* \* \* I repeat the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground; and there is as lit-



struction of the light would cause a material injury to the comfort of complainant, the relief will not be granted.<sup>5</sup>

§ 860. **Tests to be applied; illustrations.** In cases where relief by injunction is sought to prevent a deprivation of ancient lights, the question for determination is usually as to the degree of deprivation. And where a substantial injury is shown to result from the proposed erection and the darkening of plaintiff's lights, a court of equity may properly interfere.<sup>6</sup> The test to be applied is, whether plaintiff's house is, by the obstruction which he seeks to enjoin, rendered in a substantial degree less fit for purposes of occupation than before. In other words, the diminution of light must be a substantial diminution, or one which renders plaintiff's house substantially less comfortable. This

tle doubt that this court will not interpose upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case; which, however, might be maintained in many cases which would not support an injunction. These affidavits, therefore, stating only that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do."

<sup>5</sup> *Wilson v. Cohen*, Rice Eq., 80. It is often a matter of great difficulty to determine what amount of obstruction to light will authorize an injunction. The rule at law as to the degree of obstruction which is actionable is laid down in *Back v. Stacey*, 2 Car. & P., 465, substantially as follows: "To consti-

tute an illegal obstruction of light by building, it is not sufficient that plaintiff has less light than before, or that the part of his house affected can not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done. It may be difficult to draw the line, but a distinction must be drawn between a practical inconvenience and a real injury to the plaintiff in the enjoyment of the premises."

<sup>6</sup> *Maguire v. Grattan*, I. R. 2 Eq., 246. In this case it was shown that the proposed erection would exclude more than one-half of the former sky area pertaining to plaintiff's premises.

being shown, equity may interfere, even to the extent of making its injunction mandatory by directing the restoration of matters to the condition in which they were before defendant's erection was begun.<sup>7</sup> And in the case of obstruction to ancient lights a mandatory injunction has been allowed, even before the hearing.<sup>8</sup> But where it is not shown that the obstruction which it is sought to enjoin is such as to interfere with the ordinary occupations of life, an injunction will be withheld, the real question to be determined being whether the light is so obstructed as to cause material inconvenience to the occupants of plaintiff's house in the ordinary and accustomed occupations of life.<sup>9</sup> And when plaintiffs fail to show any substantial damage as likely to result to themselves, the relief will be withheld.<sup>10</sup>

§ 861. **The same.** When it is sought to enjoin an obstruction to ancient lights of premises used for business purposes, the court will not interfere unless the obstruction to the lights renders the building to a material extent less suitable for the business conducted, but will leave the person aggrieved to his damages at law; the foundation of the jurisdiction being that injury to property which renders it in a material degree unsuitable for the purposes to which it is applied, or which lessens considerably the owner's enjoyment. And it would seem that the test is to be applied with reference to the injury to the business then being conducted upon the premises, and not as regards their possible future use for other purposes.<sup>11</sup> To warrant the injunction plaintiff should show that there will be a permanent obstruc-

<sup>7</sup> *Kelk v. Pearson*, L. R. 6 Ch., 809; *Home & Colonial Stores v. Colls*, (1902) 1 Ch., 302.

<sup>8</sup> *Beadel v. Perry*, L. R. 3 Eq., 465. As to the effect of delay upon the right to a mandatory injunction in this class of cases, see *Senior v. Pawson*, L. R. 3 Eq., 330.

<sup>9</sup> *Clark v. Clark*, L. R. 1 Ch., 16. See also *Durell v. Pritchard*, L. R. 1 Ch., 244.

<sup>10</sup> *City of London Brewery Co. v. Tennant*, L. R. 9 Ch., 212.

<sup>11</sup> *Jackson v. Duke of Newcastle*, 33 L. J. Ch., 698.

tion to the access of light to such an extent as to render the occupation of his premises less comfortable than before, or to prevent the present tenant from carrying on his business as beneficially as before; and this not being shown, equity should not interfere.<sup>12</sup> But where defendant's structure which it is sought to enjoin as an obstruction to plaintiff's light would seriously interfere with the occupation of plaintiff's house, and would prevent him from carrying on his business with the same degree of convenience as before, because of such obstruction to light, a proper case for injunction is presented.<sup>13</sup> So when the case presented is such as would entitle plaintiff to substantial damages, if suing at law for the obstruction to his ancient light, equity may interpose by injunction.<sup>14</sup>

§ 862. **Prescriptive right protected.** In applications for the aid of an injunction for the protection of easements in ancient lights, no distinction is made between cases where the right is acquired by prescription and cases where it rests in grant, the same equitable principles being applied in either case.<sup>15</sup> And one who has acquired a right to ancient lights by prescription, having exercised the right for a period of more than twenty years, is entitled to protection by injunction against a deprivation of this right by defendant building upon adjacent premises.<sup>16</sup> Nor is it a sufficient objection to the granting of an injunction to prevent an obstruction to plaintiff's ancient lights, which he claims by prescription, that he has obtained light in other directions which is equivalent to that of which defendant's structure will deprive him, since the right is to be determined as be-

<sup>12</sup> *Kino v. Rudkin*, 6 Ch. D., 160. effect of a covenant for quiet enjoyment.

<sup>13</sup> *Martin v. Headon*, L. R. 2 Eq., 425.

<sup>14</sup> *Dent v. Auction Mart Co.*, L. R. 2 Eq., 238.

<sup>15</sup> *Leech v. Schweder*, L. R. 9 Ch., 463. And see this case as to the

<sup>16</sup> *Weston v. Arnold*, L. R. 8 Ch., 1084. But the relief has been refused when the lights were not ancient. *Booth v. Alcock*, L. R. 8 Ch., 663.

tween the owners of the dominant and of the servient estate.<sup>17</sup> So the relief will be granted to restrain the owner of a house from rebuilding in such manner as to darken and obstruct ancient lights and windows upon plaintiff's adjoining premises.<sup>18</sup> And the obstruction by new erections of ancient lights upon plaintiff's premises has been enjoined, although plaintiff's building has been torn down and there are no existing windows whose light is obstructed by the structures which defendant is erecting.<sup>19</sup> But equity will not enjoin a defendant, who is the owner of adjoining premises, from maintaining such erections as may prevent plaintiff from acquiring a prescriptive right to light and air.<sup>20</sup>

§ 863. **Enlargement of windows; rebuilding house; change of servitude.** Equity may enjoin the erection of a building in such manner as to obstruct plaintiff's ancient lights, even though he may have enlarged his windows, since in so doing he has only exercised a natural right of property, and can not thereby lose any other right which he may have acquired.<sup>21</sup> And when a house has been destroyed and rebuilt, in determining whether the character of ancient lights attaches to the windows of the new house so as to entitle the owner to protection by injunction, the principle to be applied is, whether the new windows would impose upon the servient tenement a servitude additional to or different from that to which it was previously subjected. Whenever, therefore, it appears in such case that the servitude or burden imposed by the new windows is neither greater than nor different from that which formerly existed, the new windows may be regarded as ancient lights and an injunction may be allowed, if there is a substantial and material ob-

<sup>17</sup> *Dyers Company v. King*, L. R. 9 Eq., 438.

<sup>18</sup> *Back v. Stacy*, 2 Russ., 121; *Sutton v. Lord Montfort*, 4 Sim., 559.

<sup>19</sup> *Ecclesiastical Commissioners v. Kino*, 14 Ch. D., 213.

<sup>20</sup> *Bonner v. Great Western R. Co.*, 24 Ch. D., 1.

<sup>21</sup> *Aynsley v. Glover*, L. R. 10 Ch., 283.

struction to the light.<sup>22</sup> And applying the same principle, whenever the alteration in plaintiff's premises creates an entirely new servitude, and the owner of the ancient light has so dealt with it as to essentially alter its character and to convert it into a different easement over his neighbor's land, thereby preventing defendant from enjoying his property as he might otherwise have done, an injunction will be refused and plaintiff will be left to seek his remedy at law.<sup>23</sup>

§ 864. **Lessor and lessee.** A tenant from year to year is entitled to protection by injunction to prevent an obstruction of ancient lights upon the demised premises; but in such case, the injunction should be limited to the period of plaintiff's tenancy.<sup>24</sup> But where plaintiff, seeking to enjoin the obstruction of an ancient light, is a lessee whose lease has expired during such obstruction, but he has agreed for a renewal of the lease, he will not be denied an injunction upon that ground.<sup>25</sup> As between lessor and lessee, it is held that the lessor will not, during the continuance of his lease, be allowed an injunction to restrain his lessee from darkening windows in the demised premises and obstructing light where it is not shown that the injury is irreparable and not susceptible of compensation in damages.<sup>26</sup>

<sup>22</sup> *Curriers Company v. Corbett*, 2 Dr. & Sm., 355. See also *Staight v. Burn*, L. R. 5 Ch., 163; *Newson v. Pender*, 27 Ch. D., 43. As to the effect of a change in plaintiff's premises by tearing down his old building and rebuilding in a different manner, as regards his right to an injunction to protect his ancient lights under English statutes, see *National Co. v. Prudential Co.*, 6 Ch. D., 757.

<sup>23</sup> *Heath v. Bucknall*, L. R. 8 Eq., 1.

<sup>24</sup> *Simper v. Foley*, 2 John. & H., 555.

<sup>25</sup> *Gale v. Abbott*, 8 Jur. N. S., 987.

<sup>26</sup> *Atkins v. Chilson*, 7 Met., 398, decided upon the authority of *Ingraham v. Dunnell*, 5 Met., 118, holding that an injunction will not lie to restrain an injury caused to a reversionary interest in an estate unless the injury will be irreparable, or, from its nature, not susceptible of adequate pecuniary compensation.



§ 865. **When relative convenience balanced.** When the alleged nuisance consists in a diminution of light and air to plaintiff's building, but no serious or irreparable injury is shown, the court may balance the relative inconvenience to the parties which would result from its interference, and may refuse the injunction; especially when plaintiff's only right is as a tenant from year to year, and when he has already received notice to quit.<sup>27</sup> So if the evidence is so conflicting upon the motion for an interlocutory injunction that it is a matter of great difficulty to determine between the conflicting witnesses, the court may properly be governed by considerations of the relative inconvenience which would result to the parties from granting the relief. And if, upon weighing such considerations, it is apparent that the inconvenience which would result to defendants by granting the injunction would be far greater than that to plaintiff by its refusal, the injunction may be refused *in limine*. It is proper, however, in such a case to put defendants under terms of abiding such order as the court may make at the final hearing concerning the removal of their buildings, if they should prove to be an obstruction to plaintiff's ancient lights.<sup>28</sup> And the practice has sometimes prevailed of granting the injunction restraining defendants from making erections which would darken plaintiff's ancient lights, with liberty to defendants to apply to the court with respect to the erection of any buildings upon their property.<sup>29</sup>

§ 866. **When relief refused.** Although the building by defendant of a house upon his own premises adjoining those of plaintiff may render the prospect from plaintiff's house less pleasant than before, that will not of itself suffice for an injunction.<sup>30</sup> And equity will not interfere in this class

<sup>27</sup> *Jacomb v. Knight*, 3 DeGex, J. & S., 533.

<sup>28</sup> *Mackey v. Scottish Society*, L. R. 10 Eq., 114.

<sup>29</sup> *Stokes v. The City Offices Co.*, 2 Hem. & M., 650.

<sup>30</sup> *Fishmongers Co. v. East India Co.*, Dick., 163.

of cases when plaintiff's right is doubtful, but will leave him to establish his right at law.<sup>31</sup> So when it is sought to restrain defendant from building over what is claimed to be a public highway, in such manner as to obstruct plaintiff's light and air, the relief will be denied when plaintiff fails to show a clear legal right, and when he shows no direct grant of way or of a right to light.<sup>32</sup> And when the structure complained of as an obstruction to plaintiff's light and air consists in the erection of a screen of glass, but there is no actual evidence of obstruction to light and air, and only the opinions of witnesses are presented, the court may refuse to enjoin.<sup>33</sup>

§ 867. **Effect of plaintiff's delay.** Although the obstruction to plaintiff's ancient light is satisfactorily established, yet when such obstruction has been permitted to go on for a period of six years with full knowledge upon the part of plaintiffs before bringing their action, such delay will have much weight with the court in refusing the injunction.<sup>34</sup> Where, however, plaintiff's delay in instituting proceedings has been due to promises upon the part of defendant to remove the obstruction, such delay will not be treated as acquiescence barring the right to relief, and the injunction may still be granted if sufficient grounds are shown to warrant the exercise of the jurisdiction.<sup>35</sup>

§ 868. **Prescriptive right denied in this country; erection of building over canal.** While, as we have already seen, an easement or servitude may be created by prescription, yet in this country an exception is taken in the case of easements in light, and the English doctrine of sustaining a right to ancient lights and windows upon twenty years user does

<sup>31</sup> *Wynstanley v. Lee*, 2 Swanst. 333.

<sup>34</sup> *Gaunt v. Fynney*, L. R. 8 Ch. 8.

<sup>32</sup> *Biddle v. Ash*, 2 Ashmead, 211. 987.

<sup>35</sup> *Gale v. Abbott*, 8 Jur. N. S.

<sup>33</sup> *Radcliffe v. Duke of Portland*, 3 Gif., 702.

not generally prevail, and, while the American authorities are far from harmonious, yet the undoubted weight of authority is that mere user will not constitute sufficient ground for an injunction.<sup>36</sup> And in the absence of any grant or

<sup>36</sup> King v. Miller, 4 Halst. Ch., 559; Cherry v. Stein, 11 Md., 1; Lapere v. Luckey, 23 Kan., 534. But see, *contra*, Robeson v. Pit-tenger, 1 Green Ch., 57; Clawson v. Primrose, 4 Del. Ch., 643; S. C., 15 Am. L. Reg. N. S., 6, and cases cited. See also Shipman v. Beers, 2 Abb. New Cas., 435. King v. Miller, 4 Halst. Ch., 559, was a bill for an injunction to restrain defendant from so building as to close up complainant's window in the gable end of his house, which he claimed was an ancient window. Complainant's house stood on the line of his lot. The injunction was denied, Halstead, Chancellor, saying: "The owner of a lot has the election to build on it as he pleases. The owner of the adjoining lot has the same right. If the one who builds first chooses to build on the line, the adjoining owner has no means of preventing it, and has no means of preventing the continuance of the building on the line. Where one has a right to put up a building on the spot where he erects it, and to continue it there, and the adjoining owner can do nothing to prevent its erection on that spot, and can do nothing to prevent its remaining there, it is simply absurd to say that the latter can by lapse of time lose his right to build up to his line. The loss of a right by lapse of time, from an act done and continued

by another, can only be in cases where the party against whom the time is running has some means of preventing the act or its continuance. Where he has no such means, he is in no default, and can, therefore, lose no right. And a person by doing and continuing an act on his property which he has a right to do, and which another has no means of preventing, can acquire no right injurious to the property of that other." Cherry v. Stein, 11 Md., 1, was a bill to restrain defendant from erecting a wall in such manner as to darken and shut up the lights and windows upon one side of complainant's house, complainant relying upon twenty years user. Eccleston, J., delivering the opinion of the court, denied the application of the English rule, saying: "Where A makes a window in his own house, overlooking the open grounds of B, it is no infringement of the rights, or encroachment upon the property of the latter. \* \* And yet, under the English rule, if the window remains open and unobstructed for more than twenty years, B can not afterwards erect a building on his land, if it obstructs the light. To prevent such a consequence the rule does not give him any right of action or legal proceeding, but his only remedy is the seemingly ill-natured one of rendering the window of his neighbor

covenant giving to plaintiff an easement in light and air, the construction of a bay window by defendant in such manner as to obstruct the view from and diminish the supply of light and air to plaintiff's adjoining house will not be enjoined.<sup>37</sup> But, as already indicated, the American authorities are far from harmonious, and in Delaware the English doctrine of title by prescription to ancient lights prevails, and the obstruction of such lights by an adjacent owner may be enjoined.<sup>38</sup> And in New Jersey it is held that when one sells a house so situated that the light necessary for its reasonable enjoyment is derived from and over an adjoining lot belonging to the same grantor, an easement to light and air over such vacant lot passes as an incident to the grant, because necessary to its proper enjoyment. And in such case, a subsequent grantee of the adjacent lot, with notice, may be restrained from the erection of a building which will obstruct plaintiff's light and air.<sup>39</sup> So where the co-owners of a piece of land, upon one-half of which is a building having a window through which light and air are

useless, by building a wall or other obstruction for that purpose alone, if at the time he has no wish to build a house on his own property. And if the window be of considerable height, the expense of obstructing it might be equivalent, or nearly so, to the value of the unimproved or vacant land designed to be protected. The effects and legal consequences resulting from the user of a way, and that of a light, are so essentially different, we do not perceive the propriety of holding that the twenty years rule which is applicable to the former should also be applied to the latter." And the court refused to sustain the injunction.

<sup>37</sup> *Jenks v. Williams*, 115 Mass., 217.

<sup>38</sup> *Clawson v. Primrose*, 4 Del. Ch., 643; S. C., 15 Am. L. Reg. N. S., 6, and note with exhaustive collection of American cases. See also *Hulley v. Security T. & S. D. Co.*, 5 Del. Ch., 578.

<sup>39</sup> *Sutphen v. Therkelson*, 38 N. J. Eq., 318. As to the right to a preliminary injunction to restrain the erection of a building in such manner as to darken plaintiff's windows and exclude the light, in violation of a covenant in the conveyance under which defendant derives title, until the question of plaintiff's right may be determined, see *Pope v. Bell*, 35 N. J. Eq., 1.

received across the other half of the property, afterward sever the ownership by the exchange of deeds and it appears that the use of such light and air are reasonably necessary for the beneficial enjoyment of the property, an easement is created which equity will protect by injunction, and the owner of the adjoining land may therefore be restrained from erecting a building in such a manner as to close the window and thus deprive plaintiff of his easement of light and air.<sup>40</sup> So where plaintiff owns premises abutting upon a private way or alley, which has never been dedicated to the public and which belongs in equal portions to the owners of the adjacent lots, he may enjoin defendant, an adjacent lot owner, from erecting a fence upon plaintiff's side of the alley which will result in closing plaintiff's windows and in excluding light and air from his premises.<sup>41</sup> So the owner of land adjacent to a canal which is a public highway is entitled to receive from it light and air, and equity will restrain one holding under the canal company from erecting a building over the canal in such manner as to close up complainant's windows and deprive him of the free enjoyment of this right.<sup>42</sup>

§ 869. **Title derived from common source.** Where both plaintiff and defendant derive title to adjacent premises from a common source, and defendant is about to erect a building upon his vacant premises which will have the effect of obstructing many of plaintiff's windows in a building constructed by the original grantor of both parties, equity will not interfere by injunction in the absence of any covenant in the grant under which plaintiff claims indicating an intention upon the part of the grantor to limit the use of the vacant lot so that it shall not impair plaintiff's light and air.<sup>43</sup>

<sup>40</sup> Greer v. Van Meter, 54 N. J. Eq., 270, 33 Atl., 794.

<sup>42</sup> Barnett v. Johnson, 2 McCart., 481.

<sup>41</sup> Sankey v. St. Mary's Female Academy, 8 Mont., 265, 21 Pac., 23.

<sup>43</sup> Shipman v. Beers, 2 Ab. New Cas., 435.



## III. EASEMENTS IN WATER.

- § 870. Easements in water protected; evidence; licensee.
- 870a. Protection to mill owners.
- 871. Easement by prescription protected.
- 872. Doctrine of prescription in cases of mills.
- 873. Relief in behalf of mill owners.
- 874. The same.
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§ 870. **Easements in water protected; evidence; licensee.**

An easement or servitude in water is, under some circumstances, entitled to protection in equity, and an injunction will be granted in a proper case. Thus, riparian proprietors of a private stream, entitled to the use and enjoyment of the stream without diminution or alteration, will be protected by injunction from violation of their right.<sup>1</sup> And where mills are situated on both sides of the stream, if the

<sup>1</sup> *Society v. Low*, 2 C. E. Green, I. & S. Co., 13 Ore., 496, 11 Pac., 19; *Howe v. Norman*, 13 R. I., 488; 255; *Earley's Appeal*, 121 Pa. St., Brown v. Ashley, 16 Nev., 311; 496, 15 Atl., 602. But in Michigan *Bitting's Appeal*, 105 Pa. St., 517; the courts have manifested a reluctance to interfere by injunction *Heilbron v. Canal Co.*, 75 Cal., 426, 17 Pac., 535. See also *Lux v. Haggin*, 69 Cal., 255, 10 Pac., 674; *Barneich v. Mercy*, 136 Cal., 205, 68 Pac., 589; *Proprietors v. Braintree W. S. Co.*, 149 Mass., 478, 21 N. E., 761, 4 L. R. A., 272; *Kay v. Kirk*, 76 Md., 41, 24 Atl., 326, 35 Am. St. Rep., 408; *Weiss v. Oregon* I. & S. Co., 13 Ore., 496, 11 Pac., 19; *Howe v. Norman*, 13 R. I., 488; 255; *Earley's Appeal*, 121 Pa. St., Brown v. Ashley, 16 Nev., 311; 496, 15 Atl., 602. But in Michigan *Bitting's Appeal*, 105 Pa. St., 517; the courts have manifested a reluctance to interfere by injunction for the purpose of regulating rights or easements in water, unless in cases of an intentional violation of the right. See *Hoxsie v. Hoxsie*, 38 Mich., 77; *Bradfield v. Dewell*, 48 Mich., 9, 11 N. W., 760.

mill owner upon one side attempts to deprive the other of his share of the water, a preliminary injunction may be granted, since the injury is likely to prove irreparable.<sup>2</sup> So the owner of lands through which flows a non-navigable stream may restrain defendant from floating logs down the stream, which results in a continuous trespass to plaintiff's premises.<sup>3</sup> It has been held, however, that complainant must first establish his rights at law, as well as a violation of those rights.<sup>4</sup> And where only a casual and occasional infringement of the right is shown, as by defendant's using more than his share of water for mill purposes, no suit at law having been brought to test the question of right, equity will withhold its interference, on the ground that no mischief is likely to ensue which can not be remedied at law.<sup>5</sup> The evidence upon which a court will perpetuate an injunction in this class of cases must clearly establish the essential allegations of the bill, the burden of proof being on the complainant. And where the evidence consists only of the opinions of witnesses, there being great contrariety of opinion, it will not suffice to make an injunction perpetual.<sup>6</sup> And it would seem that a mere license, not amounting to an absolute grant, to use water from a well upon adjoining premises will not authorize an injunction at the suit of the licensee to prevent defendant from depriving him of the use of the water.<sup>7</sup>

§ 870 *a*. **Protection to mill owners.** Relief by injunction for the protection of easements in water is most frequently invoked in behalf of mill owners. And a riparian owner

<sup>2</sup> *Arthur v. Case*, 1 Paige, 447.

<sup>3</sup> *Haines v. Hall*, 17 Ore., 165. 20 Pac., 831.

<sup>4</sup> *Bliss v. Kennedy*, 43 Ill., 67; *Howell Co. v. Pope Glucose Co.*, 171 Ill., 350, 49 N. E., 497. But see *Pollitt v. Long*, 58 Barb., 20.

<sup>5</sup> *Norris v. Hill*, 1 Mich., 202.

<sup>6</sup> *Woodruff v. Lockerby*, 8 Wis.,

369. This was a case where a preliminary injunction had been granted to restrain defendants from the erection of a mill in such manner as to deprive complainant of sufficient water for mill purposes.

<sup>7</sup> *Applegate v. Morse*, 7 Lans., 59.

upon a navigable stream, having a right to the natural flow of the water past his premises for mill purposes, may restrain its unauthorized obstruction by the erection of a dam in such manner as to interfere with his right.<sup>8</sup> So a mill owner, who is entitled by grant to an easement in a specified quantity of water flowing over defendants' dam above, may restrain defendants from removing the old dam and building a new one farther up the stream which would have the effect of depriving plaintiff of the quantity of water to which he is entitled.<sup>9</sup> And a purchaser of a mill under foreclosure proceedings may restrain the former owner from interfering with the dam and mill-race to the injury of the mill, when they constitute the sole source of supply for the mill.<sup>10</sup> So the owner of a mill and mill pond may enjoin a city from taking water for the supply of the city from such pond, either directly by means of pipes, or indirectly by means of a well dug in the vicinity of the pond.<sup>11</sup> So a mill owner who is entitled to the natural flow of water from a stream for the operation of his mill may restrain its diversion by a riparian owner farther up the stream.<sup>12</sup> And when plaintiff is entitled by contract to all the water for the use of his mills which flows over defendant's dam and which is not used by defendant, the latter may be enjoined from opening his gates and letting the water run to waste.<sup>13</sup> And when plaintiff is entitled to a given quantity of water for the use of his mill, and defendant operating a factory upon the same stream is entitled to the water subject to plaintiff's prior right, defendant may be enjoined from interfering with such right.<sup>14</sup>

<sup>8</sup> *Morrill v. Saint Anthony F. W. P. Co.*, 26 Minn., 222, 2 N. W., 842.

<sup>12</sup> *Higgins v. Flemington W. Co.*, 36 N. J. Eq., 538.

<sup>9</sup> *Matteson v. Wilbur*, 11 R. I., 545.

<sup>13</sup> *Fuller v. Daniels*, 63 N. H., 395.

<sup>10</sup> *Curtis v. Norton*, 58 Mich., 411, 25 N. W., 327.

<sup>14</sup> *Mudge v. Salisbury*, 110 N. Y., 413, 18 N. E. 249.

<sup>11</sup> *City of Emporia v. Soden*, 25 Kan., 588.

§ 871. **Easement by prescription protected.** An easement in water may be acquired by prescription, and when so acquired it is as absolute as any other right, and equity will restrain its violation when such violation is productive of serious injury.<sup>15</sup> Thus, when complainant has used and enjoyed a stream for his mill during a period of sixty years without interruption, defendants owning land on the borders of the stream above may be enjoined from materially or sensibly altering or diverting the stream to the detriment of complainant's enjoyment.<sup>16</sup> So acquiescence for twenty years in defendant's adverse use of water which had previously flowed into complainant's mill pond will prevent the obtaining of an injunction.<sup>17</sup> Nor will it avail complainant that there had been a three years' reflow of the water into his pond, defendants not having intended to abandon their right during that time.<sup>18</sup> But, although complainant has been in possession twenty years, he will not be allowed, without first having established his right at law, to restrain the drawing off of water from a lake supplying his mill by means of a subterranean channel created five years before.<sup>19</sup>

§ 872. **Doctrine of prescription in cases of mills.** The doctrine of prescription is perhaps more frequently invoked in aid of applications for the preventive aid of equity in cases of easements in water for mill purposes than in other cases of water privileges. And when plaintiff has been in the open, uninterrupted and public use of water for his

<sup>15</sup> *Hulme v. Shreve*, 3 Green Ch., 116; *Matteson v. Wilbur*, 11 R. I., 545; *Eckerson v. Crippen*, 110 N. Y., 585, 18 N. E., 443.

<sup>16</sup> *Shreve v. Voorhees*, 2 Green Ch., 25. But the injunction was retained only so far as was necessary to secure complainant in the use of his mill as he had before enjoyed it, without any material or sensible alteration, and was dis-

solved so far as it restrained defendants from erecting their mill on their own land and using the water for mill purposes.

<sup>17</sup> *Haight v. Morris Aqueduct*, 4 Wash. C. C., 601.

<sup>18</sup> *Id.*

<sup>19</sup> *Reid v. Gifford*, 6 John. Ch., 19. But see *Reid v. Gifford*, Hopk. Ch., 416.

mill for a period of thirty-eight years, such uninterrupted user will be deemed conclusive evidence of his right, and will warrant an injunction against the erection of a new dam which would have the effect of destroying his water-power.<sup>20</sup> So when plaintiff has been in the uninterrupted use and enjoyment of a water-course for more than twenty years for the supply of his mill, and a tenant of lands upon the opposite side of the stream seeks to prevent him by force from repairing his dam so as to prevent a diversion of the water, an injunction is proper to restrain such tenant from interfering with plaintiff in making the repairs.<sup>21</sup> So, too, the right to overflow lands by the erection of a mill-dam, like other easements, may be acquired by long and adverse enjoyment for a period exceeding twenty years. And when for more than twenty-four years the owners of real estate which is overflowed by a dam have acquiesced in its erection and maintenance, and have during such period permitted its owner to make large expenditures without objection, they will not be permitted to enjoin the rebuilding of a portion of the dam which has been destroyed.<sup>22</sup>

§ 873. **Relief in behalf of mill owners.** Since the purchase of a right carries with it of necessity all the incidents and privileges connected with the right and essential to its enjoyment, the purchaser of land on which stands the abutment of a mill-dam is entitled to the same use of the water which had been enjoyed by his grantor, and a court of equity may enjoin the grantor from using or interfering with the water, or diverting it from grantee's mill.<sup>23</sup> And as between parties who are owners in severalty of different mills situated upon the same mill-dam and having the right to a certain portion of the water for the use of

<sup>20</sup> *Matteson v. Wilbur*, 11 R. I. 545.

<sup>22</sup> *Vail v. Mix*, 74 Ill., 127.

<sup>21</sup> *McSwiney v. Haynes*, 1 Ir. Eq. 322.

<sup>23</sup> *Wall v. Cloud*, 3 Humph., 181; *Cox v. Howell*, 108 Tenn., 130, 65 S. W., 868, 53 L. R. A., 487.



their respective mills, one of the parties may be enjoined from drawing off a portion of the water at a considerable distance above the dam. In such a case it is not essential that actual, perceptible damage should be shown, it being sufficient ground for equitable relief that there is a violation of the right by diverting the stream from its full and natural flow. And the fact that defendant is entitled to the use of the water for his dam below does not authorize him to impair the flow of the stream by drawing off the water at a higher point.<sup>24</sup>

§ 874. **The same.** The authorities already cited serve to illustrate the extreme liberality which has usually characterized courts of equity in granting preventive relief for

<sup>24</sup> *Webb v. Portland Manufacturing Co.*, 3 Sumner, 189. Story, J., after stating that in actions of this nature, it is not necessary to show actual, perceptible damage, a clear violation of the right being shown, observes: "But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is, that the injury done is irremediable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose I need not state, as the elementary treatises fully expound them. If, then, the diver-

sion of water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs. A court of equity will not indeed entertain a bill for an injunction in case of a mere trespass fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill."

the protection of mill owners in their easements or privileges in the use of water for supplying their mills. As still further illustrating this tendency it is held that where a mill owner derives his title from the grantors of defendants, and by the terms of his grant he is entitled to a sufficient quantity of water from defendants' dam for the use of his mill and works, he may have an injunction to restrain defendants from depriving him of the quantity of water to which he is entitled under his grant. But in such a case plaintiff himself may be enjoined from using the water for the purpose of running additional machinery not necessary to the use of his mill as it had been formerly used.<sup>25</sup> And the owner of a mill who is entitled under his grant to the use of water from a reservoir erected by his grantors, may enjoin a subsequent grantee under the same grantors of the land covered by such reservoir from destroying it and from doing any act which would materially diminish the supply of water, or which would interfere with its flow upon plaintiff's premises.<sup>26</sup> So the owner of a water-power created by a dam erected in improving the navigation of a river, who is entitled to the surplus water above what is required for purposes of navigation, may restrain riparian proprietors from drawing water from the dam without authority.<sup>27</sup> So the owner of a mill which is supplied with water from a creek may enjoin a diversion of the water from such creek by a railway company conducting the water through pipes for the supply of its engines, when such diversion materially diminishes the grinding power of plaintiff's mill.<sup>28</sup> And the extension by defendants of a ditch

<sup>25</sup> *Comstock v. Johnson*, 46 N. Y., N. W., 529, 36 N. W., 828. See also 615. See also *Valley P. & P. Co. v. Fox River F. & P. Co. v. Kelley*, West, 58 Wis., 599, 17 N. W., 554. 70 Wis., 287, 35 N. W., 744.

<sup>26</sup> *Simmons v. Cloonan*, 2 Lans., 346.

<sup>27</sup> *Green Bay & M. C. Co. v. Kauna W. P. Co.*, 70 Wis., 635, 35

<sup>28</sup> *Garwood v. New York C. & H. R. R. Co.*, 17 Hun, 356. But under the statutes of West Virginia it is held, that where one has granted

in such manner as to draw off the waters of a lake at high water, the lake being the source of supply for plaintiff's mills, affords sufficient ground for an injunction to restrain such extension and diversion of the water.<sup>29</sup> Where, however, plaintiffs are mill owners upon a basin communicating with a public canal, but without title or prescriptive right as against the state, they will not be permitted to enjoin the canal commissioners of the state from closing such basin, even though the privilege of which they are thus deprived is of great value.<sup>30</sup>

§ 875. **Detention of water from factory.** An unreasonable use or detention of water by defendant operating a saw-mill upon a stream above plaintiff's factory affords sufficient ground for an injunction as a violation of plaintiff's easement in the stream. And when defendant so operates his mill as to wholly deprive plaintiff of water for the use of his factory for several of the working hours of each day, and then permits the water to flow in such unusual quantities that plaintiff can only use a small portion of it, thus causing constant interruption to plaintiff's factory, an injunction will be allowed.<sup>31</sup>

§ 876. **Underground channels.** The use of water in a well upon one's own premises will not be restrained because it is alleged that plaintiff is thereby deprived of water in his well or spring upon adjoining premises, when it is not shown how he is thus deprived, the channel, if any, being underground, or the result of percolation through the soil.

to a railway company the right to construct its road through his land, and afterward seeks to enjoin the company from cutting a channel through his land so as to divert the waters of a creek from plaintiff's mills and property, an injunction will not be allowed when the bill contains no averment of the insolvency of the com-

pany, and no averment that the owner can not be adequately compensated in damages. *Chesapeake & Ohio R. Co. v. Bobbett*, 5 West Va., 138.

<sup>29</sup> *Bennett v. Murtaugh*, 20 Minn., 151.

<sup>30</sup> *Burbank v. Fay*, 5 Lans., 397.

<sup>31</sup> *Pollitt v. Long*, 58 Barb., 20.

The law of surface water is inapplicable to such cases and the owner is entitled to the advantages of his own land, and can not know that the water supplying his well percolates through another's land.<sup>32</sup> And a distinction is drawn between cases where the owner of lands in the use of his own premises makes excavations which result in draining off the water from plaintiff's well upon adjacent premises, and cases where such conduct results in depriving plaintiff of the use of water flowing in a well defined channel through plaintiff's premises; and while in the former class of cases it is held that such excavations may be properly made, in the latter equity will interfere by injunction.<sup>33</sup> If, however, defendants in sinking a well upon their own premises intercept a subterranean stream which supplies plaintiff's land, they may be restrained from so operating their well as to deprive plaintiff of his supply of water, the quantity of water being ample for both parties by a proper adjustment of pipes in defendant's well.<sup>34</sup>

§ 877. **Mining ditch; ditch for drainage; drawing off water from navigable river.** When the easement consists in the right to the use of water flowing through a ditch for mining, agricultural and other purposes, an unauthorized diversion of the water may be prevented by injunction.<sup>35</sup> So when the bill avers the ownership by plaintiffs of a ditch used for the purpose of conveying water to their mining claims, and that they have been in its actual and

<sup>32</sup> *Roath v. Driscoll*, 20 Conn., 533; *Ocean Grove Camp Meeting Association v. Commissioners*, 40 N. J. Eq., 447, 3 Atl., 168; *Hougan v. Milwaukee & St. P. R. Co.*, 35 Iowa, 558.

<sup>33</sup> *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch., 483.

<sup>34</sup> *Burroughs v. Saterlee*, 67 Iowa, 396, 25 N. W., 808.

<sup>35</sup> *Imboden v. Etowah & B. B. M.*

*Co.*, 70 Ga., 86; *Graham v. Dahlonga G. M. Co.*, 71 Ga., 296; *Moore v. Clear Lake Water Works*, 68 Cal., 146, 8 Pac., 816; *Spargur v. Heard*, 90 Cal., 221, 27 Pac., 198; *Mott v. Ewing*, 90 Cal., 231, 27 Pac. 194. And see these last two cases as to the necessity of proving damages in injunction suits brought for the protection of easements in water.

peaceable possession for many years, using it for mining purposes: that at the time the ditch was located the land over which it passes was vacant and unlocated, and that plaintiffs' rights in the premises are prior and paramount to any that defendants have in the land upon the line of the ditch, which averments are not traversed by the answer, it is proper to enjoin defendants from destroying or interfering with the ditch.<sup>36</sup> But where plaintiffs are the owners of a ditch used for mining purposes and entitled to the unobstructed use of the water flowing through it, and seek to enjoin defendants from mining operations upon the stream above plaintiffs' ditch, upon the ground of injury to the ditch by filling it with sand and sediment, an injunction will be refused when defendants are solvent and able to respond in damages at law.<sup>37</sup> So where plaintiffs, for the purpose of draining a pond of surface water upon their land, had dug a ditch over defendant's lands, under a parol license from defendant which he afterward revoked and then proceeded to fill up the ditch, it was held that he could not be enjoined from so doing when it was not shown that the filling of the ditch would interrupt the natural flow of the surface water as it flowed before the ditch was dug; and that plaintiffs could acquire no prescriptive right to the use of the easement in such case, since its enjoyment and user were not adverse, but permissive.<sup>38</sup> And it has been held that the drawing off of water from a river, to such an extent as to interfere with and impede navigation, affords no ground for an injunction.<sup>39</sup>

§ 878. **Supply of water from other premises.** One who purchases land subject to the burden of a continuous easement, such as the right to the flow of water therefrom for the supply of another's house, will be enjoined from de-

<sup>36</sup> *Gregory v. Nelson*, 41 Cal., 278.

<sup>38</sup> *Fryer v. Warne*, 29 Wis., 511.

<sup>37</sup> *Atchison v. Peterson*, 1 Mont., 561.

<sup>39</sup> *Attorney - General v. Great Eastern R. Co.*, L. R. 6 Ch., 572.



priving the latter of the benefit of the easement by diverting the flow of the water in such manner as to deprive his house of its supply.<sup>40</sup> So plaintiff, having an easement in the flow of water through an artificial raceway over and upon defendant's premises, may enjoin defendant from diverting the water or interfering with or obstructing its flow.<sup>41</sup> And a municipal corporation, which is authorized by law to appropriate water from a private stream for the use of the municipality and which has constructed works for this purpose, may restrain the obstruction of and diversion of the water from the stream.<sup>42</sup> And where plaintiff by virtue of an express grant has an easement in the use of water as conducted from defendant's premises for manufacturing purposes, with the right to enter upon the servient estate to construct and repair the necessary pipes and connections for supplying the water, or to dig other springs and construct other water-courses, the grantor having covenanted not to use the water so as to unnecessarily interfere with such easement, defendant may be enjoined from unnecessary and useless excavations upon his own premises which result in diminishing the supply of water for plaintiff's manufactory. In such case, the acts of defendant being in derogation of his grant and in violation of his covenant, and resulting in irreparable injury to plaintiff, an injunction is the appropriate remedy.<sup>43</sup> So plaintiff, having an easement implied by grant from the defendant in the flow of water from a stream upon defendant's land, which is essential to the full enjoyment of the estate conveyed, may enjoin defendant from interfering with the continuous flow of the

<sup>40</sup> *De Luze v. Bradbury*, 10 C. E. Green, 70.

<sup>41</sup> *Johnston v. Hyde*, 33 N. J. Eq. 632; *Fulton v. Greacen*, 36 N. J. Eq., 216.

<sup>42</sup> *Haupt's Appeal*, 125 Pa. St., 211, 17 Atl., 436.

<sup>43</sup> *Johnstown C. M. Co. v. Veghte*, 69 N. Y., 16. But in this case the grant was of the use of the water as then conducted from the springs and streams on the grantor's

lands.

water.<sup>44</sup> So where the owner of premises conveyed them by deed, reserving the right to take all the waste water running by an aqueduct from a spring into a tub upon the premises to other premises owned and held by him, and reserving also the right to dig up and repair the aqueduct, he was allowed to enjoin subsequent grantees from obstructing him in his easement, and from interfering with or interrupting him while repairing the aqueduct.<sup>45</sup> Where, however, the grant is only of the right to use and lead to the grantee's house the water from a particular spring upon the premises of his grantor, the latter will not be enjoined from digging another spring upon his own premises, although it may injure the quality and reduce the quantity of water supplied to the grantee from the former spring.<sup>46</sup>

§ 879. **The same.** It is also to be noticed that the preventive relief extended by courts of equity in cases of easements in water is not confined to the protection of the grantee of the easement, but may be exercised against him for the purpose of restraining an undue use of the water in excess of the terms of his easement. And where defendant has an easement or grant of the privilege of drawing water from a spring upon plaintiff's premises through a pipe of a given diameter, he may be enjoined from using a larger pipe than that authorized by the express terms of the grant.<sup>47</sup> So an injunction will lie to prevent a lessee of a specific quantity of water from using the water in excess of the amount authorized by the lease, the value of such use being difficult of ascertainment.<sup>48</sup>

<sup>44</sup> *Paine v. Chandler*, 134 N. Y., 385, 32 N. E., 18, 19 L. R. A., 99.

<sup>45</sup> *Hill v. Shorey*, 42 Vt., 614. And it is also held in this case that plaintiff is entitled to a decree in the same cause for the damages sustained by reason of the wrongful interference with and obstruction of his rights.

<sup>46</sup> *Bliss v. Greeley*, 45 N. Y., 671. And see *Trustees v. Youmans*, 45 N. Y., 362, affirming S. C., 50 Barb., 316; *Mosier v. Caldwell*, 7 Nev., 363.

<sup>47</sup> *Markham v. Stowe*, 66 N. Y., 574.

<sup>48</sup> *Lawson v. Menasha W. W. Co.*, 59 Wis., 393, 18 N. W., 440.

§ 880. **Joinder of plaintiffs.** As regards the joinder of parties plaintiff in actions of this nature, it is held that owners in severalty of different tracts or premises upon a mill stream, who are operating mills thereon, may maintain an action to restrain the improper diversion of water to the injury of their mills. In such case, although the titles are different, yet the injury, being a common one, creates such a community of interest as to entitle them to join in the action.<sup>49</sup>

§ 881. **Illustrations of the general doctrine.** Although equity will restrain the use of water to the injury of an easement when plaintiff's right is clear and well established, it will not interfere when the right is doubtful and the facts are not definitely ascertained.<sup>50</sup> So to warrant an injunction against obstructing the flow of water for a mill, the bill must show such obstruction to be unlawful; and mere general allegations that defendant has obstructed the water of the stream, thereby preventing complainant's mill from running, and that he will continue to do so, will not suffice.<sup>51</sup> Nor will equity interfere to settle and adjust the respective rights of parties to the use of water, nor to determine how much each one is entitled to use, complainant not having established definitely what his rights are.<sup>52</sup> And an injunction will not be granted when the right has not been long used by plaintiff, or established at law, and when it is in controversy between the parties.<sup>53</sup>

§ 882. **Canal company.** Where one is entitled to a water-power supplied from a public canal, he can not by his own

<sup>49</sup> Reid v. Gifford, Hopk. Ch., 416; Emery v. Erskine, 66 Barb.,

9. As to the right of one tenant in common of water privileges to restrain a diversion of the stream see Lyth Creek W. Co. v. Perdad, 65 Cal., 447, 4 Pac., 426.

<sup>50</sup> Roath v. Driscoll, 20 Conn., 533.

<sup>51</sup> Patten v. Marden, 14 Wis., 473.

<sup>52</sup> Olmstead v. Loomis, 6 Barb., 152; Howell Co. v. Pope Glucose Co., 171 Ill., 350, 49 N. E., 497.

<sup>53</sup> Perkins v. Foye, 60 N. H. 496.

acts define or limit the right of the canal company to the use of the water, and a perpetual injunction will be allowed against such an attempt.<sup>54</sup> And where a canal company is entitled to all the waters of a creek with which to supply its canal, it will not be enjoined from increasing the height of a dam which it has erected to turn the water into its canal, merely because a mill owner below the dam is deprived of water for his mill by thus increasing the height of the dam.<sup>55</sup>

§ 883. **When injunction denied.** Where complainant, having conveyed his mill site, has no use for the water himself, but seeks an injunction evidently as a means of compelling defendant to make compensation for the use of the water, which might readily be had in an action at law, the relief will be withheld.<sup>56</sup> And an injunction will not lie to restrain lessees from the erection of works whereby water will be drawn off and used in a manner different from that specified in the lease.<sup>57</sup>

§ 884. **Effect of acquiescence as an estoppel.** One who has by his own acts consented to or acquiesced in the use of water in a particular manner will be estopped from afterward enjoining its use in that manner. Thus, where complainant without objection has stood by and allowed defendant to erect a mill in violation of the terms of his grant to defendant of the right to use the water in a particular manner, he is by his silence debarred from any relief against such diversion of the water.<sup>58</sup> And where defendants, relying upon a verbal assurance that they would be allowed to

<sup>54</sup> *Erie Canal Co. v. Walker*, 29 Pa. St., 170.

<sup>55</sup> *Spangler's Appeal*, 64 Pa. St., 387.

<sup>56</sup> *Warne v. Morris C. & B. Co.*, 1 Halst. Ch., 410.

<sup>57</sup> *Society v. Butler*, 1 Beas., 499, reversing S. C., *Id.*, 264.

<sup>58</sup> *Jacox v. Clark, Walk. (Mich.)*, 249. But see as to the distinction between laches and acquiescence as affecting the right of a riparian owner to protection by injunction in the flow of water to which he is entitled, *Lux v. Haggin*, 69 Cal., 255, 10 Pac., 674.

draw water for a mill from a lake whose outlet ran through complainant's land, have erected their mill without objection from complainant, he will not be allowed to enjoin the taking of water from the lake for the use of such mill.<sup>59</sup> So where one has permitted the use of water in a certain manner for twenty years, and has received compensation for such use, he will be estopped from relief by injunction.<sup>60</sup> Nor in such case is the insolvency of the defendant a sufficient cause for the interposition of equity, since insolvency, although often influencing the court, does not of itself authorize the injunction.<sup>61</sup> So plaintiff's acquiescence for a period of seven years in the diversion of water, to the use of which he is entitled, has been held a sufficient bar to relief by injunction.<sup>62</sup> And property owners upon a stream used for rafting logs, who have for a long series of years acquiesced in the maintenance of certain booms in the stream by a defendant corporation which has invested large sums of money in its enterprise, will not be permitted to enjoin the maintenance and operation of such booms.<sup>63</sup>

§ 885. **The same.** Upon similar principles it is held that long acquiescence on the part of the proprietors of a water-power in a certain measurement of water to which defendants are entitled will preclude the proprietors from obtaining relief by injunction against such measurement or use of the water, especially where erections have been made by defendants at considerable expense, which would be almost a total loss in case the injunction should be granted.<sup>64</sup> So acquiescence on the part of plaintiffs in the deprivation of water, which they afterward seek to enjoin, may estop them from obtaining relief in equity. Thus, where defendants

<sup>59</sup> *Payne v. Paddock*, Walk. (Mich.), 487.

<sup>62</sup> *Pennsylvania R. Co.'s Appeal*, 125 Pa. St., 189, 17 Atl., 478.

<sup>60</sup> *Heilman v. Union Canal Co.*, 37 Pa. St., 100.

<sup>63</sup> *Power's Appeal*, 125 Pa. St., 175, 17 Atl., 254.

<sup>61</sup> *Heilman v. Union Canal Co.*, 37 Pa. St., 100. And see, *ante*, § 18.

<sup>64</sup> *Blanchard v. Doering*, 23 Wis., 200.



were entitled by an act of parliament to use water from plaintiffs' canal for a particular purpose, but for no other, and they had been for many years permitted by plaintiffs to use the water for other purposes, and plaintiffs then sought to enjoin such use, an interlocutory injunction was refused, even though plaintiffs had established their right by an action and judgment at law.<sup>65</sup> And when it is sought to enjoin defendants from keeping their dam closed in such manner as to prevent the flow of water to plaintiff's mill, but plaintiff has delayed proceedings for a period of more than three years after the erection of the dam, he will not be allowed an injunction. And the fact that the damages sustained may be recoverable at law affords additional ground for refusing equitable relief in such case.<sup>66</sup> So when the owner of mills and of a water-power, with full knowledge of the facts, has long acquiesced in the diversion of water from the stream for the use of a city, an injunction may be properly refused.<sup>67</sup> And where a mill owner, claiming the right to the unobstructed flow of the water of a river, has, by his unreasonable delay in the assertion of his rights, made it impossible or very difficult for the court to enjoin the diversion of the water without causing great injury to the defendant and to the public at large, relief by injunction will be denied and the plaintiff will be left to his remedy at law.<sup>68</sup>

<sup>65</sup> Rochdale Canal Co. *v.* King.  
2 Sim. N. S., 78.

<sup>66</sup> Varney *v.* Pope, 60 Me., 192.

<sup>67</sup> City of Logansport *v.* Uhl, 99  
Ind., 531.

<sup>68</sup> Fisk *v.* City of Hartford, 70  
Conn., 720, 40 Atl., 906, 66 Am. St.  
Rep., 147.

## IV. RIGHTS OF WAY.

- § 886. Governing principles.
- 887. Action at law to determine right.
- 888. Right by prescription protected; right must be clear.
- 889. Verbal license.
- 890. Right of way to stable.
- 891. Representations of grantor as an estoppel.
- 892. Right of way in alley.
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- 895. Relief against heirs of grantor; non-user.
- 896. Mandatory injunction.
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- 896*b*. Right of passage through rooms; stairway.
- 896*c*. Easement arising from sale with reference to plat.

§ 886. **Governing principles.** Equity will protect the enjoyment of a right of way over a street, alley or road by restraining the erection of obstructions thereon, the interference being based upon the irreparable injury to the person aggrieved, and the inadequacy of the remedy at law.<sup>1</sup> But the facts showing such irreparable injury must be stated in the bill, and mere allegations will not suffice.<sup>2</sup> Where, however, complainant alleges a prescriptive right of way over defendant's land to a public road and to a market, and that he has no other means of outlet except a circuitous and inconvenient route, he makes out a sufficient

<sup>1</sup> *Roman v. Strauss*, 10 Md., 89; *W.*, 740; *Cihak v. Klekr*, 117 Ill., 643, 7 N. E., 111; *Newell v. Sass*, 303, 9 N. W., 426; *French v.* 142 Ill., 104, 31 N. E., 176; *Smith v. Young*, 160 Ill., 163, 43 N. E., 130; *Nicholls v. Wentworth*, 100 N. Y., 455, 3 N. E., 482; *Avery v.* Ill., 387, 57 N. E., 1062, 51 L. R. A., N. Y. C. & H. R. R. Co., 106 N. Y., 301.  
<sup>2</sup> *Roman v. Strauss*, 10 Md., 89. And see *Amelung v. Seekamp*, 9 Texas R. Co., 63 Tex., 152; *Devore v. Ellis*, 62 Iowa, 505. 17 N. Gill & J., 468.

case of irreparable mischief to entitle him to a injunction.<sup>3</sup> So a private way of necessity over defendant's land, implied by grant, as the only means of connection between plaintiff's land and a public highway will be protected by injunction.<sup>4</sup> So the relief will be allowed for the protection of a right of way created by express grant.<sup>5</sup> So an easement in a private alley, created by mutual covenants in the deeds by which the co-owners of land have divided it in severalty, is entitled to protection by injunction in behalf of one co-owner against those claiming under the other.<sup>6</sup> And a court of equity having jurisdiction over the parties may enjoin a defendant from interference with an easement or right of way belonging to plaintiff, although the property in question is situated in another state.<sup>7</sup> And upon a bill by a vendee of lands for a specific performance of an agreement by the vendor to convey a right of way leading to the lands in question over other lands of the vendor, it is proper to enjoin the latter from obstructing the right of way, plaintiff's right to a specific performance being clearly shown.<sup>8</sup> And in order to entitle the plaintiff to relief, it is not necessary that the easement or right of way should be absolutely essential to the enjoyment of the estate but it is enough if the right claimed is highly beneficial.<sup>9</sup> A clear and undoubted right should be shown to warrant the exercise of the jurisdiction, and if the right be doubtful a decree will be withheld until it is established at law.<sup>10</sup> Even though the

<sup>3</sup> *Shipley v. Caples*, 17 Md., 179.

<sup>4</sup> *Jay v. Michael*, 92 Md., 198, 48 Atl., 61.

<sup>5</sup> *Herman v. Roberts*, 119 N. Y., 37, 23 N. E., 442, 7 L. R. A., 226, 16 Am. St. Rep., 801. And see this case as to the form of the injunction.

<sup>6</sup> *Yeager v. Manning*, 183 Ill., 275, 55 N. E., 691.

<sup>7</sup> *Alexander v. Tolleston Club*, 110 Ill., 65.

<sup>8</sup> *Russell v. Napier*, 80 Ga., 77, 4 S. E., 857.

<sup>9</sup> *Cihak v. Klekr*, 117 Ill., 643, 7 N. E., 111; *Newell v. Sass*, 142 Ill., 104, 31 N. E., 176; *Smith v. Young*, 160 Ill., 163, 43 N. E., 486.

<sup>10</sup> *King v. McCully*, 38 Pa. St., 76; *Wakeman v. New York, L. E. & W. R. Co.*, 35 N. J. Eq., 496.

right of way be admitted and its obstruction be also admitted, the court will not therefore interfere to restrain such obstruction, but may in its discretion refuse the relief.<sup>11</sup> Nor will the court interfere when the proof is so indefinite that the right of way claimed can not be accurately determined.<sup>12</sup> Nor will the relief be granted where the right of way in which the easement is claimed is of no practical value to the plaintiff, and in such case he will be left to the pursuit of his remedy at law for the vindication of his naked legal rights.<sup>13</sup> And in any event, the injunction, when granted, should be merely co-extensive with the duration of the easement claimed, and should not be perpetual unless the easement itself is so.<sup>14</sup>

§ 887. **Action at law to determine right.** By analogy to the rule that equity will not interfere to restrain a trespass pending a trial at law to determine the right, where no irreparable injury is shown, in the absence of such injury it will not enjoin an obstruction of a right of way pending an action at law to determine the right.<sup>15</sup> And in such case the mere allegation in the bill of irremediable damage will not suffice, but the facts must appear which show that the apprehension of such injury is well founded.<sup>16</sup> And when a statute forbids the granting of injunctions against the erection or use of public works until the question of damages has been decided by a court of common law, an injunction will not be allowed a claimant of a right of way over land regularly appropriated by a city for public purposes, where no proceedings at law have been instituted.<sup>17</sup> But when there is no reasonable doubt of plaintiff's legal title, and the

<sup>11</sup> *Clack v. White*, 2 Swan, 540.

<sup>14</sup> *Yeager v. Manning*, 183 Ill.,

<sup>12</sup> *Fox v. Pierce*, 50 Mich., 500, 275, 55 N. E., 691.

15 N. W., 880.

<sup>15</sup> *Amelung v. Seekamp*, 9 Gill &

<sup>13</sup> *Seeger v. Mueller*, 133 Ill., 86, J., 468.

24 N. E., 513; *Gulick v. Fisher*,

<sup>16</sup> Id.

92 Md., 353, 48 Atl., 376.

<sup>17</sup> *Wolbert v. Philadelphia*, 48 Pa. St., 439.

obstruction to the right of way is clear, it is proper to enjoin in the first instance, without requiring plaintiff to establish his right in an action at law.<sup>18</sup>

§ 888. **Right by prescription protected; right must be clear.** A right of way may be acquired by prescription which will be protected in equity.<sup>19</sup> And a bill alleging a right of way over adjacent premises confirmed by forty years' use, and which defendants have obstructed and destroyed, contains sufficient equity to warrant an injunction. The injury in such case is considered as not susceptible of reparation in damages, and one whose continuance must work a constantly recurring grievance, as well as an interruption to the quiet and long continued enjoyment of the easement annexed to complainant's private estate.<sup>20</sup> But to justify relief, the plaintiff's right must be clear, and in the absence of satisfactory proof that the user by the plaintiff was adverse, the injunction should be denied.<sup>21</sup>

§ 889. **Verbal license.** Where the owner of land has given verbal permission for the construction of a road or right of way through a portion of his premises, the grantee of such privilege or easement will not be restrained from exercising it merely because the owner of the premises has changed his mind and desires to revoke the privilege.<sup>22</sup>

§ 890. **Right of way to stable.** The owner of an inn, having a right of way to his stable in the rear, over the land of an adjacent owner, may have the aid of equity to restrain defendants from blocking up or obstructing such right of way. And the fact that the obstruction is caused by several persons, and that the amount or degree of obstruction caused by each, individually, may not of itself afford ground of

<sup>18</sup> *Mulville v. Fallon*, 1 R. 6 Eq., West Va., 282, 21 S. E., 1020.  
458.

<sup>20</sup> *Webber v. Gage*, 39 N. H., 182.

<sup>19</sup> *Shipley v. Caples*, 17 Md., 179; <sup>21</sup> *Gulick v. Fisher*, 92 Md., 353,  
*Webber v. Gage*, 39 N. H., 182; 48 Atl., 376.

*Sheeks v. Erwin*, 130 Ind., 31, 29 <sup>22</sup> *Lexington & O. R. Co. v. Orms-*  
N. E., 11; *Boyd v. Woolwine*, 40 *by*, 7 Dana, 276.



complaint, will not prevent the relief as against the obstruction caused by all.<sup>23</sup>

§ 891. **Representations of grantor as an estoppel.** It may also happen that a vendor of real property is estopped by his own representations or acts from obstructing an easement or right of way enjoyed by his vendee, and such estoppel may constitute sufficient ground for relief by injunction. For example, when the owner of two adjoining lots sells one of them, representing to his vendee that there is an alley between them, the joint use of which will be conveyed with the lot sold, and the vendee pays an increased price, relying upon such representation, the grantor may be enjoined from obstructing such alley, although it is not mentioned in the conveyance.<sup>24</sup> So when the vendor of a lot agrees by parol that an adjoining strip of land upon his own premises shall be opened as a street for the use of the grantee and the public, and the street is so opened and used for several years, an easement exists in favor of the purchaser, and his grantee may enjoin the vendor from obstructing and closing up the street.<sup>25</sup> And where plaintiffs have bought lots from defendant adjoining a park which was laid out and dedicated by defendant, plaintiffs having a perpetual easement in and right of way over the park may enjoin defendant from destroying the trees and shrubbery in such park and from laying it out in building lots and selling them.<sup>26</sup>

§ 892. **Right of way in alley.** Where plaintiffs own real estate in a city, adjacent to an alley over which they have an easement or right of way, the alley being the only means of access to the rear of their lots except through their dwellings, and defendant, claiming title to the premises under defective and void tax sales, is about to erect a building upon

<sup>23</sup> *Thorpe v. Brumfitt*, L. R. 8 Ch., 650.

<sup>25</sup> *Newman v. Nellis*, 97 N. Y., 285.

<sup>24</sup> *Kirkpatrick v. Brown*, 59 Ga., 450.

<sup>26</sup> *Morris v. Sea Girt L. I. Co.*, 38 N. J. Eq., 304.

the alley, it is proper to grant an injunction restraining such erection upon condition of payment by plaintiffs to defendant of the amount actually paid by him for the tax titles, with legal interest.<sup>27</sup> So the obstruction of plaintiff's right of way in an alley may be enjoined when such obstruction deprives him of the use of the alley and thereby materially lessens the value of his property.<sup>28</sup> And in such case, the fact that plaintiff has previously made some encroachments upon the alley will not estop him from relief in equity.<sup>29</sup> Where, however, the encroachment upon plaintiff's right of way in an alley between his premises and those of defendant is very slight and will not seriously interfere with or impair the right of way, the court may properly regard the relief sought as disproportioned to the injury complained of, and may, therefore, decline to interfere.<sup>30</sup> Nor will defendants be enjoined from building upon their own premises in such manner as to obstruct an easement or use of an alley claimed by plaintiff, when defendants have bought without notice, either actual or constructive, of such easement.<sup>31</sup>

§ 893. **Access to lot in cemetery.** The owner of a lot purchased for burial purposes in a cemetery, who has made his purchase with reference to certain avenues and streets as platted, is entitled to the aid of an injunction to prevent the obstruction of an avenue leading to his lot by the erection of tombs and monuments therein. And the relief is

<sup>27</sup> *Kean v. Asch*, 12 C. E. Green, 57. As to the right of the owner of a house abutting upon a private alley, having an easement or right of passage therein appurtenant to his premises, to restrain its obstruction, see *Stallard v. Cushing*, 76 Cal., 472, 18 Pac., 427.

<sup>28</sup> *Schaidt v. Blaul*, 66 Md., 141, 6 Atl., 669; *Cihak v. Klekr*, 117 Ill., 643, 7 N. E., 111; *Newell v. Sass*, 142 Ill., 104, 31 N. E., 176;

*Smith v. Young*, 160 Ill., 163, 43 N. E., 486; *Yeager v. Manning*, 183 Ill., 275, 55 N. E., 691.

<sup>29</sup> *Schaidt v. Blaul*, 66 Md., 141, 6 Atl., 669. And see this case as to the effect of plaintiff's acquiescence upon his right to relief in equity.

<sup>30</sup> *Hall v. Rood*, 40 Mich., 46.

<sup>31</sup> *Kicklighter v. Rosenthal*, 74 Ga., 151.

proper in such a case, whether plaintiff be regarded as having an absolute title, or only a servitude.<sup>32</sup>

§ 894. **Purchaser with notice bound; establishing boundaries by agreement; obstruction to tow-path.** Equity may properly enjoin an obstruction to a right of way over real property as against a subsequent purchaser, although the instrument granting the right be not recorded, provided such purchaser acquired his title with full knowledge of the easement.<sup>33</sup> So purchasers, who buy with full notice of an easement or right of way may be enjoined from obstructing such right, even though it rests only in parol, it having been accepted and acted upon and money having been expended in improving it by the licensee acting in good faith.<sup>34</sup> And relief may be granted against a subsequent purchaser who is chargeable with notice of the record of the instrument creating the easement, although no reference is made to the covenant in the *mesne* conveyances.<sup>35</sup> And when one purchases lots fronting upon a private way or street, with the right of way thereon, subject to a like right in the grantor, the latter may be enjoined from cutting down the grade of the street to the injury of the grantor.<sup>36</sup> So the owners of adjacent wharves having covenanted that an intervening dock should be kept open as a common passage way, without obstruction or impediment, the lessees of one of such wharves may be restrained from violating the covenant by permitting vessels to lie at their dock in such manner as to project into the common passage way.<sup>37</sup> So where the owners of adjoining lands, by mutual agreement, definitely establish the boundaries of a private way which had been previously located along their line, and appropriate the strip of land between such boundaries to be

<sup>32</sup> *Burke v. Wall*, 29 La. An., 38.

<sup>33</sup> *McCann v. Day*, 57 Ill., 101.

<sup>34</sup> *Simons v. Morehouse*, 88 Ind., 391.

<sup>35</sup> *Yeager v. Manning*, 183 Ill., 275, 55 N. E., 691.

<sup>36</sup> *Kelley v. Saltmarsh*, 146 Mass., 585, 16 N. E., 460.

<sup>37</sup> *Commercial Wharf Co. v. Winsor*, 146 Mass., 559, 16 N. E., 560.

used for the mutual benefit of the abutting property, and, in pursuance of the agreement, afterward erect fences along the boundaries so agreed upon and thereafter use the strip as a private way, an easement in such strip is thereby created, the obstruction of which by a purchaser with notice from one of the original owners may be enjoined by a purchaser from the other owner.<sup>38</sup> And an obstruction to a towing-path along a private canal, to which plaintiff is entitled, may be enjoined.<sup>39</sup>

§ 895. **Relief against heirs of grantor; non-user.** When one conveys real property reserving to his grantee a right of passage over the grantor's premises for the purpose of carrying away filth from the premises conveyed, the grantee is entitled to an injunction against the heirs of his grantor to restrain them from obstructing the passage.<sup>40</sup> And equity will protect a right of way by injunction although there may have been for a period of many years a non-user of the right, if plaintiff had resumed it before the doing of the acts complained of as an obstruction to the easement.<sup>41</sup>

§ 896. **Mandatory injunction.** Where defendant had persisted in erecting an obstruction to plaintiff's right of way after full notice of the right and after suit begun for an injunction, and the court upon the hearing found plaintiff entitled to the injunction, it was made mandatory and defendant was ordered to remove within a given time the erections made since the commencement of the suit; and this, even under a statute authorizing the court in its discretion to award pecuniary damages to the person injured in lieu of an injunction.<sup>42</sup> And a right of way over defendant's land arising by prescription may be protected by mandatory injunction requiring the removal of the obstruction complained of.<sup>43</sup>

<sup>38</sup> *Shields v. Titus*, 46 Ohio St., 528, 22 N. E., 717.

<sup>41</sup> *Cook v. Mayor*, L. R. 6 Eq., 177.

<sup>39</sup> *Selby v. Nettlefold*, L. R. 9 Ch., 111.

<sup>42</sup> *Krehl v. Burrell*, 7 Ch. D., 551.

<sup>43</sup> *Boyd v. Woolwine*, 40 West Va., 282, 21 S. E., 1020.

<sup>40</sup> *Kraut's Appeal*, 71 Pa. St., 64.

§ 896 *a*. **Obstruction to passage way under railroad.** Where a land owner has conveyed a right of way to a railway company, upon its agreement to construct and maintain a passage way for teams and cattle under the railroad, and such way has been constructed and used for many years, the land owner may enjoin the filling up of the way by a company which has succeeded to the rights of the former company under foreclosure proceedings.<sup>44</sup>

§ 896 *b*. **Right of passage through rooms; stairway.** As between different tenants occupying different portions of the same building, one who has long enjoyed and exercised an easement or right of passage through the other's rooms to obtain access to a heater used in warming the building may enjoin an interruption by the other tenant in the use of such easement.<sup>45</sup> But a widow, having a dower interest in the half of a building and claiming an easement in a stairway upon the other half of the building, has been refused an injunction to prevent the removal of such stairway by the owner.<sup>46</sup>

§ 896 *c*. **Easement arising from sale with reference to plat.** Where the original proprietor of a subdivision makes a plat dividing the land into lots, blocks and streets and afterwards sells and conveys lots with reference to the plat, a right in the nature of an easement arises in favor of all subsequent purchasers of property fronting upon the streets to have them at all times kept free and unobstructed; and the erection of a bridge over the highway by one owning buildings upon both sides will be enjoined as an unlawful interference with such right.<sup>47</sup>

<sup>44</sup> *Swan v. B., C. R. & N. R. Co.*, 72 Iowa, 650, 34 N. W., 457.

<sup>45</sup> *Hodge v. Giese*, 43 N. J. Eq., 342, 11 Atl., 484.

<sup>46</sup> *Scott v. Palms*, 48 Mich., 505, 12 N. W., 677.

<sup>47</sup> *Field v. Barling*, 149 Ill., 556, 37 N. E., 850, 24 L. R. A., 406.



## CHAPTER XV.

### OF INJUNCTIONS FOR THE PROTECTION OF FRANCHISES.

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- 909. Written evidence of franchise, when required.
- 910. Exclusive right of navigating river.
- 911. Distinction between franchise and monopoly; gas companies.

§ 897. **The general doctrine stated.** The violation of franchises or special privileges conferred by legislative authority, either upon individuals or upon corporations, affords frequent occasion for invoking the extraordinary aid of equity by way of injunction to remedy evils which the usual modes of redress in courts of law are powerless to mitigate or to prevent. The value of a franchise being generally dependent upon its exclusive use and possession, it may be protected upon the ground of the inadequacy of the legal remedy and the probability of thus avoiding a multiplicity of suits.

Where, therefore, the owner of the franchise is in actual possession and his title or right is not disputed, an injunction is the proper remedy for protecting him in the exercise of the exclusive privilege granted him by statute.<sup>1</sup>

§ 898. **Establishing right at law.** The former tendency of the English Court of Chancery seems to have been to require plaintiff first to establish his right at law, before relief by injunction would be granted for the protection of his franchise.<sup>2</sup> But in this country the rule may now be regarded as well established, that to warrant the interposition of equity for the protection of franchises it is not necessary that the owner of the franchise should have first established his right by action at law. The legislative power of the state having authority to grant the exclusive right which it is sought to protect, the granting of such right is regarded as equivalent to having established it at law.<sup>3</sup> And where defendants are in the actual possession of a franchise or privilege granted them by legislative authority, they will not be restrained in the exercise of such privilege at the suit of persons having no particular rights of their own, save a general right common to every citizen, and which it is claimed the franchise violates.<sup>4</sup>

§ 899. **Jurisdiction akin to that in nuisance; water company protected.** In a general sense the relief afforded by

<sup>1</sup> *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H., 35; *Hartford B. Co. v. East Hartford*, 16 Conn., 149; *Enfield T. B. Co. v. Hartford & N. H. Co.*, 17 Conn., 40; *Gates v. McDaniel*, 2 Stew., 211; *Lucas v. McBlair*, 12 Gill & J., 1; *McRoberts v. Washburne*, 10 Minn., 23; *Livingston v. Ogden*, 4 Johns. Ch., 48; *In re Vanderbilt*, Ib., 57; *Ogden v. Gibbons*, Ib., 150, affirmed 17 Johns., 488; *Tyack v. Brumley*, 1 Barb. Ch., 519; S. C., 4 Edw. Ch., 258; *North River S. B. Co. v. Hoffman*, 5 Johns. Ch., 300; *Livingston v. Van Ingen*, 9 Johns., 507; *Auburn & C. P. R. Co. v. Douglass*, 12 Barb., 553; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1.

<sup>2</sup> *Whitchurch v. Hide*, 2 Atk., 391.

<sup>3</sup> *Moor v. Veazie*, 31 Maine, 360; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H., 35.

<sup>4</sup> *Lansing v. North River S. B. Co.*, 7 Johns. Ch., 162.

courts of equity against the invasion of a franchise may be regarded as akin to that which is extended in cases of nuisance, and the violations of right in the two classes of cases are closely analogous. And where the legislature has conferred an exclusive privilege or franchise, and the persons accepting it have long been in the exercise and enjoyment of all the rights thereby conferred, and have performed the duties imposed, any acts which tend to disturb them in their rights and to dispossess them of their franchise are in legal contemplation a nuisance, the only safe and adequate remedy for which is by recourse to equity.<sup>5</sup> Thus, a water company, having the exclusive right or franchise of supplying water in a given locality, may enjoin a rival company from interference with such right.<sup>6</sup>

§ 900. **Right must be coupled with possession; negligence.** A distinctive feature of the relief in this class of cases is that the right for whose protection the aid of equity is invoked must be coupled with possession. While, therefore, courts of equity will entertain jurisdiction to prevent any unauthorized interference with a franchise where the person seeking relief is in actual possession, yet if possession be wanting the injunction will be withheld. So he who seeks an injunction for the protection of a franchise must be free from negligence in order to entitle himself to the relief. And where he has negligently failed to perform certain conditions annexed to the granting of his franchise by the legislative power, he will not afterward be allowed to enjoin the performance of

<sup>5</sup> *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Boston Water P. Co. v. Boston & W. R. Co.*, 16 Pick., 512. The same principle is recognized in *Central B. Co. v. Lowell*, 4 Gray, 474, although the injunction was refused on other grounds.

<sup>6</sup> *Williamsport W. Co. v. Lycoming G. & W. Co.*, 95 Pa. St., 35. As to the considerations governing the court in refusing a preliminary injunction in such case, see *Stein v. Bienville W. S. Co.*, 32 Fed., 876.

those conditions by others authorized so to do by act of legislature.<sup>7</sup>

§ 901. **Former doctrine when grant not exclusive in terms; intendment in favor of exclusiveness.** Not a little conflict of authority has existed upon the question whether equity may interfere by injunction for the protection of a franchise which is not made exclusive in its nature by the express terms of the legislative grant, and whether any intendment or presumption may be indulged for the purpose of giving an exclusive character to the grant which the legislative power has not seen fit specifically or expressly to confer. The earlier doctrine upon this subject, which had the sanction of no less an authority than Chancellor Kent, was, that although the franchise or grant to the citizen which it was sought to protect by injunction was not in terms exclusive, yet the element of exclusiveness might be attached to it by necessary implication and that the franchise should be so construed as to give it due effect by excluding all contiguous competition of an injurious character. And in conformity with this doctrine injunctions were allowed for the protection of franchises resting in legislative grant, which by their terms were not exclusive.<sup>8</sup>

§ 902. **Later doctrine averse to intendment.** The later and now generally received doctrine, however, is that legislative acts granting franchises to corporations are to be strictly construed in accordance with the terms of the grant, and that the grantee takes nothing by implication either as against the state, or as against other grantees of similar franchises from the state. In order, therefore, to warrant relief in equity against an invasion of or infringement upon

<sup>7</sup> *Enfield T. B. Co. v. Connecticut River Co.*, 7 Conn., 51.

<sup>8</sup> 3 Kent's Com., 459; *Croton Turnpike Co. v. Ryder*, 1 John. Ch., 611; *Newburgh Turnpike Co. v. Miller*,

5 John. Ch., 101. But the doctrine of these cases is overruled in *Auburn & Cato Plank Road Co. v. Douglass*, 9 N. Y., 444.

the franchise, it must appear by the terms of the grant from the state that plaintiff is entitled to the exclusive enjoyment of the franchise in question; and unless this element of exclusiveness appears in the grant itself, it will not be imported by implication. Unless, therefore, the grant of the franchise under which plaintiff claims is exclusive in its terms, equity will not interfere by injunction to restrain the operations of persons claiming the right to exercise a similar franchise under legislative authority.<sup>9</sup> And since an exclusive franchise can not be implied from a legislative grant, in the absence of express terms whereby it is made exclusive, it follows that a legislature may rightfully create a franchise which will conflict with one previously created, if the first were not in express terms exclusive of all others. Thus, a railway company may be incorporated to run its road through the same valley with a canal previously incorporated, but whose charter is not exclusive in terms; and if the termini of the railway are such as to require it to cross the canal, it will not be enjoined from the erection of bridges for that purpose.<sup>10</sup> And when a city grants to a street railway company the right to maintain and operate its railway in the streets, the city having no power to grant such a privilege in perpetuity to the exclusion of other companies,

<sup>9</sup> *Charles River Bridge v. Warren Bridge*, 11 Pet., 420, Mr. Justice Story and Mr. Justice Thompson dissenting, affirming S. C., 6 Pick., 376; *Auburn & Cato Plank Road Co. v. Douglass*, 9 N. Y., 444, reversing S. C., 12 Barb., 553, and overruling *Croton Turnpike Co. v. Ryder*, 1 John. Ch., 611, and *Newburgh Turnpike Co. v. Miller*, 5 John. Ch., 101; *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh, 42; *Fall v. County of Sutter*, 21 Cal., 237; *President v. Trenton C. B. Co.*, 2 Beas., 46. But see *White's*

*Creek Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch., 396. See also *Crawfordsville & E. T. Co. v. Smith*, 89 Ind., 290. In a note to 3 Kent's Com., 459, the learned commentator concedes that the rule as contended for by him is subverted by the *Charles River Bridge* case, and admits with expressions of regret that the doctrine of the latter case is now the prevailing doctrine in American constitutional law.

<sup>10</sup> *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh, 42.



a rival company will not be enjoined from constructing and operating a line through the same streets.<sup>11</sup>

§ 903. **Exclusive right to fishing protected.** An exclusive right of fishing in a river, which is derived and held under letters patent from the crown, is treated as a franchise of such a nature as to be protected in equity. And where, in such a case, plaintiff has established his right by a verdict at law, he is entitled to the aid of equity by injunction to restrain an interference with his exclusive right.<sup>12</sup>

§ 904. **Letters patent to maintain theatre.** Where under an act of parliament letters patent are issue by the crown to a citizen, authorizing him during a specified term to maintain a theatre in a city, the statute prohibiting any person from acting within the city, except in such theatre as should be so established, under a penalty to be recovered by any person who should sue for the same, it is held that the patentee, having no such right as would enable him to sue at law, and having only a right in common with others to sue for the penalty as a common informer, is not entitled to an injunction to restrain unauthorized persons from acting in a theatre for which no patent has been granted.<sup>13</sup>

§ 905. **Boom company.** When a corporation of a *quasi* public nature, such as a boom company, whose franchises are granted for the public use, is in the lawful exercise of such franchises in constructing and maintaining booms for receiving logs upon a navigable river, an action can not be maintained by a riparian owner to enjoin such corporation, since this would be in effect to allow a private action against the state itself to subordinate the paramount public right to the subservient private right. And if such corporation has

<sup>11</sup> Birmingham & P. M. S. R. Co. v. Birmingham S. R. Co., 79 Ala., 465. And see Montgomery G. L. Co. v. City Council, 87 Ala., 245, 6 So., 113, 4 L. R. A., 616. <sup>12</sup> Ashworth v. Browne, 10 Ir. Ch. 421. <sup>13</sup> Calcraft v. West, 2 Jo. & Lat., 123.

so constructed its works as to impede the navigation of the river, the remedy must be sought not in equity, but in an action at law for damages.<sup>14</sup>

§ 906. **United States courts may enjoin destruction of franchise; tax on franchise.** While as a general rule the courts of the United States have no jurisdiction to restrain proceedings in the state courts,<sup>15</sup> they will grant an injunction against a public officer of a state to restrain him from such proceedings under a void statute of the state as are likely to destroy a franchise created by the United States.<sup>16</sup> But the fact that a tax has been illegally imposed upon a franchise does not of itself constitute sufficient foundation for relief by injunction. In this respect a tax upon a franchise does not differ from a tax levied upon any other species of property, real or personal, and a court of equity is governed by the same principles in granting or withholding an injunction against taxation of a franchise as are applicable in all other cases where its aid is invoked to restrain the collection of revenues. If, therefore, the only equity in support of the bill is the illegality of the tax imposed, the proper remedy is at law, and an injunction will not be allowed.<sup>17</sup> If, however, the injury is so irremediable in its nature as to render the legal remedy inadequate to redress the wrong complained of, as if there is danger of the destruction of the franchise itself by the threatened enforcement of an unconstitutional tax, an injunction may properly be allowed.<sup>18</sup>

§ 907. **Fraudulent usurpation of corporate franchise.** Where parties are fraudulently possessed of the franchises

<sup>14</sup> *Cohn v. Wausau Boom Co.*, 47 Wis., 314, 2 N. W., 546.

<sup>15</sup> *Diggs v. Wolcott*, 4 Cranch, 179.

<sup>16</sup> *Osborn v. U. S. Bank*, 9 Wheat., 738.

<sup>17</sup> *De Witt v. Hays*, 2 Cal., 463.

And see *Mechanics Bank v. Debolt*, 1 Ohio St., 591.

<sup>18</sup> *Foote v. Linck*, 5 McLean, 616; *Woolsey v. Dodge*, 6 McLean, 142.

These cases are based upon *Osborn v. U. S. Bank*, 9 Wheat., 738.

of a corporation created by law, and are exercising its functions, a bill for an injunction will lie in behalf of the persons aggrieved as a matter of private right, and it is not necessary that proceedings be first had by the proper officer of the state to oust the corporation of its franchise. And it is competent in such case for any number of the stockholders of the corporation to file a bill for an injunction.<sup>19</sup> But if no questions of private right are involved, the charge being of the usurpation of a franchise by a corporation assuming powers not within its charter, in direct contravention of a public statute, equity will not interfere by injunction, the proper remedy being by information in the nature of a *quo warranto*.<sup>20</sup>

<sup>19</sup> Putnam v. Sweet, 1 Chand., 286.

<sup>20</sup> Attorney-General v. Utica Ins. Co., 2 Johns. Ch., 371. This was an information filed by the Attorney-General to restrain defendant, an insurance company, from conducting a banking business in violation of a statute prohibiting unincorporated banking associations. The injunction was refused, Kent, Chancellor, observing: \* \* \* "The right of banking was, formerly, a common law right belonging to individuals, and to be exercised at their pleasure. But the legislature thought proper, by the restraining act of 1804, and which has since been re-enacted, to take away that right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the legislature, and subsisting only in those who can produce the grant; if exercised by other persons, it is the usurpation of a privilege, for which a competent remedy can be had by the public pros-

ecutor in the Supreme Court. I can not find that this court has any ordinary concurrent jurisdiction in the case. \* \* \* The charge contained in the information savors, then, so much of a criminal offense that it would require a clear and settled practice to justify the interference of this court, when that interference is not called for in aid of a prosecution at law. The charge of an usurpation of a franchise has so frequently occurred, and the remedy by injunction is so convenient and summary, that the jurisdiction of this court would have been placed beyond all possibility of doubt, and have been distinctly announced, by a series of precedents, if any such general jurisdiction existed. But I have searched in vain for this authentic evidence of such a power. The precedents are all in the court of K. B., and Kyd cites nearly an hundred instances, within the last century, of informations filed in the K. B. to call in question the exercise of a franchise."

§ 908. **Franchise to conduct lottery.** Inadequacy of the remedy at law and the avoiding of a multiplicity of suits are strong grounds for the granting of injunctions to protect statutory privileges of an exclusive nature. And a franchise to carry out a lottery scheme for a public purpose is so far exclusive as to come within this rule and to be entitled to protection by injunction. In such case the commissioners appointed by law to carry out the purposes of the lottery are proper parties to institute an action in their own name to restrain a violation of the franchise committed to them; but the state is not a necessary party.<sup>21</sup>

§ 909. **Written evidence of franchise, when required.** Where the existence of complainant's right or franchise depends upon a written instrument or contract, he will be required to produce such written evidence, or in default thereof to assign some satisfactory reason for his failure. If he omits to produce such evidence and fails to assign any satisfactory reason for such omission, he will not be allowed an injunction.<sup>22</sup>

§ 910. **Exclusive right of navigating river.** Legislative grants of the exclusive right of navigating rivers with steamboats have been the subject of judicial construction, with reference to the question whether a franchise thus conferred is entitled to protection by injunction. Where such a franchise is granted by a state legislature, and it in no manner conflicts with the power of Congress under the constitution to regulate inter-state commerce, the franchise may be protected by injunction.<sup>23</sup> And in New York it was formerly held that an exclusive franchise of this character was entitled to protection in equity, even in cases where it interfered with the right of navigation as between different states, and that citizens of another state might be enjoined

<sup>21</sup> *Lucas v. McBlair*, 12 Gill & J., 1.

<sup>22</sup> *Hankey v. Abrahams*, 28 Md., 589.

<sup>23</sup> *Moor v. Veazie*, 31 Me., 360.

from interfering with the exercise of the right, although their vessels were duly licensed under the laws of the United States as coasting vessels.<sup>24</sup> But upon appeal to the Supreme Court of the United States the doctrine of the New York courts was overthrown, and it was held that the acts of the state legislature granting the exclusive rights in question were repugnant to that clause of the constitution of the United States which authorizes Congress to regulate commerce, and that relief by injunction should not be allowed; and this doctrine was afterward acquiesced in by the courts of New York.<sup>25</sup>

§ 911. **Distinction between franchise and monopoly; gas companies.** A distinction has been drawn between a franchise proper, granted by legislative authority upon adequate consideration, where the owner of the franchise is bound to the performance of certain obligations toward the public, and a mere monopoly of an ordinary branch of trade, over which the government has no exclusive prerogative, and where no consideration either of a public or private character is reserved for the grant. And while, as we have seen, the jurisdiction by injunction is freely exercised for the protection of franchises, the grant by the government of a monopoly in the exercise of an ordinary business over which the government has no control, without any consideration and to the exclusion of all others desiring to engage in such business, will not be protected by injunction. Thus, where by an amendment to the charter of a gas company authorizing it to lay its pipes through the streets and public grounds of a city, it is provided that the right shall be exclusive except against such other persons as may be authorized by

<sup>24</sup> *Livingston v. Ogden*, 4 Johns. Ch., 48; *In re Vanderbilt*, Ib., 57; *Ogden v. Gibbons*, Ib., 150, affirmed 17 Johns., 488, but reversed, 9 Wheat., 1; *North River S. B. Co. v. Hoffman*, 5 Johns. Ch., 300. <sup>25</sup> *Gibbons v. Ogden*, 9 Wheat., 1; *North River Steamboat Co. v. Livingston*, 3 Cow., 713.



legislature, such provision is held to constitute a monopoly which is not entitled to protection in equity, and an injunction will not be allowed to prevent another company from laying down its gas pipes. Nor will the fact that pending the controversy complainants have bought a parcel of land so situated with reference to the public highway that defendants are obliged to lay their main pipe through it, authorize an injunction in favor of complainants; their voluntary purchase of the land *pendente lite* does not entitle them under such circumstances to the favorable consideration of a court of equity, and the injury, if any, may be compensated by damages in an action of trespass.<sup>26</sup> In Kentucky, however, a different doctrine prevails; and it is there held that when a gas company asserts the exclusive right under its charter of manufacturing gas in a city, equity may entertain jurisdiction of a bill to enjoin a rival company from interference with plaintiff's rights, the jurisdiction resting upon the necessity of preventing cloud upon title.<sup>27</sup> It is also held in Kentucky that an injunction is the appropriate remedy to prevent a city, which has by contract conferred upon a gas company an exclusive right in the streets for a term of years, from conferring a like privilege upon another company.<sup>28</sup> But a gas company, supplying gas to a city, can not restrain a rival company from furnishing gas upon the ground that the latter is supplying a poorer quality of gas than required by the law under which it is incorporated.<sup>29</sup> And when the franchise claimed is that of an exclusive right to lay pipes in the streets for supplying water to a city, but the legal right is disputed and has never been determined, a preliminary injunction will be refused.<sup>30</sup>

<sup>26</sup> *Norwich Gas Light Co. v. Norwich City Gas L. Co.*, 25 Conn., 19.

<sup>27</sup> *Citizens G. L. Co. v. Louisville G. Co.*, 81 Ky., 263.

<sup>28</sup> *City of Newport v. Newport L. Co.*, 84 Ky., 166.

<sup>29</sup> *Jersey City G. Co. v. Consumers G. Co.*, 40 N. J. Eq., 427, 2 Atl., 922.

<sup>30</sup> *Atlantic City W. W. Co. v. Consumers W. Co.*, 44 N. J. Eq., 427, 15 Atl., 581.

## II. ROADS AND RAILWAYS.

- § 912. Franchise in road protected; toll-gates.  
 913. Diligence required in seeking relief.  
 914. Exclusive railroad franchise between terminal points protected.  
 915. Exclusive nature of plaintiff's right; street railways.  
 916. Coach company enjoined from using street railway; rival street railways.

§ 912. **Franchise in road protected; toll-gates.** Frequent instances of the interference of equity to prevent the violation of a franchise occur in the case of roads, as where the exclusive right to control and operate a highway, turnpike, or other road, has been granted to individuals or to corporations. Thus, where complainant's road is incorporated under an act of legislature, which provides that no other road shall be constructed within thirty years after the passage of the act, the act being held constitutional is regarded as creating a contract with the corporation and an injunction will be allowed against the operation of a rival road.<sup>1</sup> And although such injuries to a franchise as call for the interposition of equity and the granting of an injunction are generally in the nature of nuisances, and although the jurisdiction of equity over such cases partakes largely of the nature of the jurisdiction in restrain of nuisance, yet the relief may be granted where the injury to the franchise is purely a trespass, if the remedy at law is inadequate. And the destruction of toll-gates and preventing the collection of tolls, although a trespass, is such a one as can not be adequately compensated in damages in an action at law, and it will therefore be enjoined in equity.<sup>2</sup>

<sup>1</sup> *Boston & L. R. Co. v. Salem & County of Plumas*, 80 Cal., 338, 22 L. R. Co., 2 Gray, 1; *Boston Water Pac.*, 254.  
*P. Co. v. Boston & W. R. Co.*, 16 <sup>2</sup> *Justices v. Griffin & W. P. P. R. Co.*, 11 Ga., 246.  
*Pick.*, 512. And see *Central B. Co. v. Lowell*, 4 Gray, 474; *Welch v.*

§ 913. **Diligence required in seeking relief.** As in all cases where the preventive jurisdiction of equity is invoked for the protection of rights, he who seeks relief against a violation of a franchise must make his application promptly and without delay, and must use reasonable diligence in the assertion of his right. And where the grievance complained of consists in the construction of a road in such manner as to impair complainant's franchise, but defendants have been permitted for a long period to proceed with the construction of their work and to incur large expenditures without objection, the injunction will be withheld.<sup>3</sup>

§ 914. **Exclusive railroad franchise between terminal points protected.** It would seem that actual injury to the franchise must exist before an injunction will be awarded, and that a mere apprehension of injurious results will not suffice if the work which it is sought to restrain may be undertaken for a legitimate purpose. And where complainants are by their charter vested with the exclusive franchise of transporting passengers and freight by railway between two cities, although they are entitled to the aid of equity to protect their franchise, yet a preliminary injunction will not be allowed to prevent two other corporations from effecting a union of their roads and forming a continuous line between the two points. The fact that such a junction may be used in derogation of complainants' rights will not warrant the interference, if there be another and a legitimate purpose for which it may be formed, since equity will not restrain the carrying out of undertakings having a legitimate object in view, merely because they may be perverted to unlawful purposes.<sup>4</sup> But when in such case it appears upon final hearing that complainants' rights are clear and unquestioned, and that they have been for more than thirty years in the enjoyment of their franchise of carrying passengers

<sup>3</sup> South Carolina R. Co. v. Columbia & A. R. Co., 13 Rich. Eq., 339.

<sup>4</sup> Delaware & R. Co. v. Camden & A. R. Co., 2 McCart., 1.

and freight between the two cities, an injunction will be allowed to prevent defendants from exercising the rights of complainants under their franchise to carry passengers through from city to city.<sup>5</sup> And where a railway company is vested with the exclusive franchise, as against all persons save the state and those upon whom the state has conferred it, to construct and operate a railroad across the state between two terminal cities, it is entitled to an injunction against the construction of a rival and competing road between the two cities, which is being constructed under legislative authority.<sup>6</sup> So a railway company invested with the privilege of loading and unloading its cars in the public streets of a city, which it has exercised for many years, may enjoin the city from enforcing an ordinance prohibiting the exercise of such privilege. And it is no objection to granting the relief in such case that the attempted invasion of plaintiff's rights is accompanied by acts which amount to personal trespasses.<sup>7</sup>

§ 915. **Exclusive nature of plaintiff's right; street railways.** To warrant relief by injunction against the violation of a franchise, satisfactory proof must be shown of the exclusive nature of plaintiff's right. And where a company claims the exclusive privilege of constructing and operating a street railway through a city, and seeks to enjoin another company from so doing, if the evidence is conflicting as to plaintiff's right to the enjoyment of the exclusive franchise claimed, because of doubt as to its compliance with the conditions annexed to the legislative grant, an injunction should not be granted upon an interlocutory application.<sup>8</sup> So it is held that the franchise of a street railway company does not

<sup>5</sup> Delaware & R. Co. v. Camden & A. R. Co., 1 C. E. Green, 321, affirmed on appeal, 3 C. E. Green, 546.

<sup>6</sup> Pennsylvania R. Co. v. National R. Co., 8 C. E. Green, 441.

<sup>7</sup> Port of Mobile v. Louisville &

N. R. Co., 84 Ala., 115, 4 So., 106. See also City Council of Montgomery v. Louisville & N. R. Co., 84 Ala., 127, 4 So., 626.

<sup>8</sup> Savannah R. Co. v. Coast Line R. Co., 49 Ga., 202.

entitle it to an injunction for the purpose of preventing another company from laying a double track through the same street, where it does not injure the first road, or interfere with its running.<sup>9</sup> And the construction of another railway company through the same streets included in a grant to a previous company does not of itself constitute an infringement of the franchise granted to the prior company, nor is it such an encroachment upon its rights as, in the absence of special injury, will warrant the interference of a court of equity.<sup>10</sup> But where a railway company, without authority of law, is proceeding to extend its track, such unauthorized extension is regarded as the attempted exercise of a valuable franchise, which is of itself sufficiently injurious to warrant a decree for a perpetual injunction.<sup>11</sup>

§ 916. **Coach company enjoined from using street railway; rival street railways.** A street railway company, having by its charter the franchise of operating its road over the streets of a city, is entitled to an injunction to restrain a coach company from using plaintiff's tracks by running its coaches thereon in competition with plaintiff in the business of carrying passengers and property, and from obstructing plaintiff in the use of its tracks.<sup>12</sup> So when a statute confirming certain franchises already enjoyed by street railway companies contains a prohibition against the construction of any other street railway parallel to those already constructed, within a given distance therefrom, a court of equity may enjoin another company from constructing a parallel road within the prohibited limit. And in such case, the injury being to a right secured to plaintiff by statute, no irreparable damage need be shown to warrant the relief.<sup>13</sup>

<sup>9</sup> New York & H. R. Co. v. Fort-second Street R. Co., 50 Barb., 285.

45 Barb., 63.

<sup>12</sup> Camden Horse R. Co. v. Citizens Coach Co., 31 N. J. Eq. (4 Stew.), 525.

<sup>10</sup> Brooklyn R. Co. v. Coney Island R. Co., 35 Barb., 364.

<sup>13</sup> St. Louis R. Co. v. Northwestern St. L. R. Co., 69 Mo., 65.

<sup>11</sup> People v. Third Avenue R. Co.,



## III. BRIDGES.

- § 917. General rule.  
918. Right need not be established at law.  
919. Jurisdiction not dependent upon defendant's profits.  
920. Landlord and tenant.  
921. Injunction withheld where right is doubtful.  
922. Negligence may bar relief.  
923. The right must be exclusive.  
924. When legal right doubtful, convenience considered.  
925. Toll-bridge protected.  
926. Acquiescence a bar to relief.

§ 917. **General rule.** The exclusive right to construct and maintain bridges being a franchise dependent upon legislative grant, the general principles of the jurisdiction of equity for the protection of franchises extend to and cover cases of this nature. Where, therefore, the exclusive right to maintain a bridge and to collect toll is invaded and the owner's rights are infringed without constitutional authority, equity will enjoin such interference. The courts proceed in such cases upon the principle that the charter granting the franchise constitutes a contract between the public and the corporation, imposing certain burdens upon the corporation, which, when fulfilled, entitle it to protection in a court of equity.<sup>1</sup>

§ 918. **Right need not be established at law.** As we have already seen, in considering the general grounds of relief for the protection of franchises, it is not necessary that the right should have been first established at law to warrant a court of equity in extending relief by injunction, since the creation of the franchise by legislative grant in the first instance is regarded as a sufficient assertion of the legal right. And where persons have been granted by act of legislature the exclusive privilege of building and maintaining a toll-

<sup>1</sup> Hartford B. Co. v. East Hart- Co. v. Hartford & N. H. Co., 17  
ford, 16 Conn., 149; Enfield T. B. Conn., 40.

bridge over a river, their right is sufficiently established at law to entitle them to the aid of equity for its protection, and any infringement of that right by the erection of another bridge to the prejudice of the first will be enjoined.<sup>2</sup>

§ 919. **Jurisdiction not dependent upon defendant's profits.** The jurisdiction in this class of cases is exercised entirely independent of the question as to whether the persons against whom the injunction is asked derive profit from their interference with complainant's rights. And where defendant, a railway corporation, allows persons to cross its railway bridge free of toll, thereby impairing complainant's franchise in a toll-bridge near at hand, an injunction will be granted to restrain the railway company from allowing its bridge to be used for the passage of any persons, vehicles or animals for which complainant is entitled to take toll.<sup>3</sup>

§ 920. **Landlord and tenant.** The relief may sometimes be allowed even though the relation of landlord and tenant exists between the parties as to the subject of the franchise to be protected. Thus, where complainants lease their bridge to defendants who use it in a manner expressly forbidden by the terms of their agreement, thereby greatly injuring complainants in the rights retained by them, an injunction will be allowed against such improper use. In such case, a court of equity proceeds upon the ground that defendants are guilty of maintaining a continuing nuisance which can be best remedied by the preventive power of equity.<sup>4</sup>

§ 921. **Injunction withheld where right is doubtful.** Where, notwithstanding the legislative grant of the franchise, the

<sup>2</sup> *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H., 35.      <sup>4</sup> *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb., 212.

<sup>3</sup> *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch., 625.

legal right is not sufficiently clear to enable the court to determine correctly, and where no irreparable mischief is alleged as likely to result from a continuance of the acts complained of, the court may very properly take into consideration the relative convenience and inconvenience to the parties by granting or withholding the relief, and be governed thereby in its determination. Thus, where one has received from parliament the right to construct and maintain a bridge, and seeks to restrain a railway company from conveying its passengers across the river in steamboats, but does not show any injury likely to result from such acts which can not be adequately compensated in damages, the question of the respective rights of the parties being in doubt, an injunction will be withheld. In such a case equity will hesitate to interfere, lest by granting the relief prayed it might pronounce an opinion in favor of the legal right before a trial at law, although it may require defendant to keep an account until the legal right can be determined, and leave will be given complainant to apply again for an injunction.<sup>5</sup>

§ 922. **Negligence may bar relief.** Negligence on the part of the owner of the franchise in performing the conditions on which he receives his exclusive right may deprive him of the aid of equity for its protection. And where a bridge company has been granted the right to erect and maintain a bridge, the charter requiring it to provide certain locks which it has made no effort to build, and by a subsequent act of legislature it is relieved from building the locks, it will not be allowed to enjoin defendants, who are proceeding under legislative authority, from constructing the locks.<sup>6</sup>

§ 923. **The right must be exclusive.** It has already been shown that in the exercise of the jurisdiction of equity for the protection of franchises the right which is the subject

<sup>5</sup> Cory v. Yarmouth & N. R. Co.,  
3 Hare, 593.

<sup>6</sup> Enfield T. B. Co. v. Connecticut River Co., 7 Conn., 51.

of legislative grant, and which it is sought to protect, must be exclusive in its nature. And where the grant of a franchise is not in terms a grant of an exclusive privilege, the government is presumed not to have intended to part with the exclusive right, but to retain it for the public benefit. Equity will not, therefore, lend its aid in such case for the protection of a right which was not intended to be exclusive.<sup>7</sup> Thus, complainants, whose right to erect and maintain a toll-bridge and to receive the tolls is not in terms exclusive of all others, will not be permitted to enjoin the opening of another bridge within such distance as greatly to impair the profits of the first.<sup>8</sup> Especially will the aid of equity be withheld in such case where it appears that complainants have so far appropriated their bridge to the use of a railway company as to render it unsafe and dangerous for the ordinary purposes of travel for which it was originally constructed.<sup>9</sup>

§ 924. **When legal right doubtful, convenience considered.**

In case of doubt as to the actual legal right to the franchise in controversy, a court of equity will generally be influenced in granting or withholding the injunction by considerations of the relative convenience and inconvenience to the parties in the cause. And if in such case the inconvenience seems to be evenly balanced, equity will leave the parties as they are until the right can be determined at law. Thus, where the owner of a bridge over a river, authorized by act of parliament, seeks to restrain a railway company from carrying its passengers across the river in steamboats, the question of the legal right being somewhat in doubt, an injunction will not be allowed in the absence of any allegations of irreparable mischief, or of such injury as can

<sup>7</sup> *Fall v. County of Sutter*, 21 Cal., 237; *President v. Trenton C. B. Co.*, 2 Beas., 46.

<sup>8</sup> *Fall v. County of Sutter*, 21 Cal., 237.

<sup>9</sup> *President v. Trenton C. B. Co.*, 2 Beas., 46.

not be adequately compensated in damages at law. The relief will also be refused under such circumstances lest equity may, by granting an injunction, pronounce an opinion in favor of the legal right before a trial at law. But the defendants may be required to keep an account, and complainant will have liberty to apply again for an injunction.<sup>10</sup>

§ 925. **Toll-bridge protected.** The grant to an incorporated company of the privilege or franchise of building a toll-bridge over a river, in consideration of the company agreeing to erect the bridge and keep it in repair, and to permit the passage of citizens at certain rates of toll, constitutes a contract, and the legislature can not alter or impair such contract without the consent of the corporators. And when a bridge company, incorporated with the powers above mentioned, have erected and maintained their bridge in accordance with their act of incorporation, the law of the state prohibiting the erection of another bridge within three miles of one already constructed, a court of equity may properly enjoin the construction and continuance of another bridge within the limits fixed by law.<sup>11</sup>

§ 926. **Acquiescence a bar to relief.** But in this class of cases, as in all others, plaintiff's acquiescence in the construction and operation of that which is afterward sought to be enjoined may work an estoppel against the desired relief. And where plaintiff, an incorporated bridge company, has acquiesced for a number of years in the construction under municipal authority of a bridge within the limits of plaintiff's exclusive franchise, and has assisted in repairing the same when destroyed, such acquiescence will operate as an estoppel to prevent the granting of an injunction to restrain the further repairing of such bridge when again destroyed.<sup>12</sup>

<sup>10</sup> *Cory v. Yarmouth & N. R. Co.*,  
3 Hare, 593.

<sup>12</sup> *Fremont F. & B. Co. v. Dodge*  
*Co.*, 6 Neb., 18.

<sup>11</sup> *Micou v. Tallassee Bridge Co.*,  
47 Ala., 652.



## IV. FERRIES.

§ 927. General rule.

928. Relief not granted where remedy exists at law.

929. Complainant must be free from blame.

930. Modification of general rule.

931. Protection extended to land necessary for enjoyment of franchise.

932. Rival ferries on river between two states.

933. County enjoined from constructing rival ferry.

§ 927. **General rule.** The right to maintain a ferry being a franchise whose value lies in its exclusiveness, equity may enjoin any unauthorized interference with or interruption of such right, upon the ground of preventing multiplicity of suits.<sup>1</sup> So the erection of a bridge in such close proximity to a ferry whose franchise is created by law, as to endanger its profits and jeopardize the exclusive right of the proprietors of the ferry, constitutes sufficient ground to warrant a court of equity in granting an injunction for the protection of the franchise.<sup>2</sup> So a city, which is invested with the exclusive franchise of maintaining ferries, and of establishing, controlling and receiving the revenues of all ferries between certain points, may enjoin the operation of a rival ferry by unauthorized persons between such points.<sup>3</sup> The rule is, however, to be accepted with the qualification that the right must be exclusive in its nature to entitle it to the protection of equity. And where complainants show no exclusive ferry privileges or franchise, they will not be

<sup>1</sup> *McRoberts v. Washburne*, 10 Minn., 23; *City of Laredo v. Martin*, 52 Tex., 548; *Tugwell v. Eagle Pass F. Co.*, 74 Tex., 480, 9 S. W., 120, 13 S. W., 654; *Midland T. & F. Co. v. Wilson*, 28 N. J. Eq. (1 Stew.), 537; *Patterson v. Wollmann*, 5 N. Dak., 608, 67 N. W., 1040, 33 L. R. A., 536. And see *Broadnax v. Baker*, 94 N. C., 675;

*Power v. Village of Athens*, 99 N. Y., 592, 2 N. E., 609; *Mason v. Harpers Ferry B. Co.*, 17 West Va., 396; *Carroll v. Campbell*, 108 Mo., 550, 17 S. W., 884.

<sup>2</sup> *Gates v. McDaniel*, 2 Stew., 211. See also *Mason v. Harpers Ferry B. Co.*, 17 West Va., 396.

<sup>3</sup> *Mayor v. Starin*, 106 N. Y., 1, 12 N. E., 631.

allowed to enjoin the keeping of another ferry at the same place.<sup>4</sup>

§ 928. **Relief not granted where remedy exists at law.** In the exercise of the jurisdiction for the protection of franchises courts of equity will look into the question of whether relief may be had at law, and if it appears that the remedy at law in damages is ample an injunction will be refused.<sup>5</sup> Where, however, upon an amended bill complainant shows the exclusive right to a ferry, which is being violated by defendant, and shows his inability to procure proof so as to proceed with an action at law, he is entitled to restrain the infringement of his franchise, even though a former application had been refused on the ground that the remedy at law was ample.<sup>6</sup>

§ 929. **Complainant must be free from blame.** He who seeks the aid of equity to restrain encroachments upon his franchise must himself be free from blame, since negligence and inattention to the business of his franchise and to the wants of the public will estop him from relief. Thus, where complainant claims the exclusive right to operate a ferry within certain limits, he will not be allowed to enjoin defendant from maintaining a ferry in violation of such right, where it appears from the evidence that complainant has been guilty of such a degree of inattention and gross carelessness as would warrant the forfeiture of his rights in a proper proceeding for that purpose.<sup>7</sup>

§ 930. **Modification of general rule.** Equity will only interfere for the protection of a franchise against those whose conduct as regards the general public is such as to impair the right of the owner of the franchise. In accordance with this principle, it has been held that private persons will

<sup>4</sup> Butt v. Colbert, 24 Tex., 355.

<sup>6</sup> Long v. Merrill, N. C. Term R.,

<sup>5</sup> Long v. Merrill, N. C. Term R., 256; S. C., 2 Murph., 339.

112; Power v. Village of Athens, 19 Hun, 165.

<sup>7</sup> Ferrell v. Woodward, 20 Wis., 458.

not be enjoined at the suit of a ferry owner from using their own boats for the transportation of themselves and families, the public not being permitted to use them.<sup>8</sup> And it would seem that the proprietors of a ferry, even though they may not have forfeited their franchise, may by non-user deprive themselves of any right to relief in equity.<sup>9</sup>

§ 931. **Protection extended to land necessary for enjoyment of franchise.** The owner of a ferry who has received his franchise by legislative grant is entitled to the protection of equity to restrain the laying out of a public road through grounds adjoining his dock, which have been used by him for a long period of years in connection with his ferry, and which are necessary for its beneficial use.<sup>10</sup>

§ 932. **Rival ferries on river between two states.** While, as has already been shown, equity will lend its aid by injunction for the protection of an exclusive ferry privilege or franchise, yet when plaintiff's only authority is a charter from one state authorizing him to operate a ferry upon a navigable river which forms the boundary between two states, and he shows no exclusive right upon the opposite shore in the other state, he will not be allowed an injunction to restrain the operations of a rival ferry.<sup>11</sup>

§ 933. **County enjoined from constructing rival ferry.** Upon a bill by the owner of a ferry to enjoin the municipal authorities of a county from constructing another ferry adjacent to his own, without tendering him damages for the taking and injury of his property, when upon the pleadings and affidavits there is great doubt whether the municipal authorities have taken the proper legal steps for condemning private property, an injunction may properly be granted

<sup>8</sup> *Trent v. Cartersville B. Co.*, 11 Leigh, 521. And see *Hunter v.*

*Moore*, 44 Ark., 184.

<sup>9</sup> *Trent v. Cartersville B. Co.*, 11 Leigh, 521.

<sup>10</sup> *Flanders v. Wood*, 24 Wis., 572.

<sup>11</sup> *Challiss v. Davis*, 56 Mo., 25.

until the hearing.<sup>12</sup> And the owner of land upon both banks of a river, having a franchise by prescription to maintain a public ferry, may restrain the county authorities from an unauthorized attempt to appropriate his franchise and to establish a free ferry.<sup>13</sup>

<sup>12</sup> County Commissioners *v.* Humphrey, 47 Ga., 565.

<sup>13</sup> Supervisors *v.* McFadden, 57 Miss., 618.

## CHAPTER XVI.

### OF INJUNCTIONS AGAINST THE INFRINGEMENT OF PATENTS.

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#### I. NATURE AND GROUNDS OF THE JURISDICTION.

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§ 934. **Object of the relief; the forum.** The jurisdiction of equity to restrain the infringement of letters patent for inventions is exercised for the prevention of irreparable injury, vexatious litigation and a multiplicity of suits, as well as for affording protection to the rights of inventors.<sup>1</sup> And

<sup>1</sup> 2 Story's Eq., § 930.



the preventive relief is granted in aid of the legal right whose protection is the ultimate object sought.<sup>2</sup> The right to interfere by injunction in this class of cases is exercised only by the United States courts, the state courts being devoid of jurisdiction.<sup>3</sup> And while the state courts have unquestioned jurisdiction to determine questions of title or of contract rights pertaining to letters patent they have no power to restrain an infringement, even as an incident to an action growing out of contracts relating to patents, the federal courts alone having power to determine questions of infringement.<sup>4</sup> Nor has a state court jurisdiction to restrain defendants from manufacturing and selling under letters patent until they pay the royalties claimed by plaintiffs under a license, when the actual controversy is as to the validity of the patent and plaintiffs' right to its exclusive use, the federal courts having exclusive jurisdiction in such cases.<sup>5</sup>

§ 935. **Judicial discretion; conditions imposed.** Substantially the same rules prevail in determining applications for preliminary injunctions in patent causes as in other cases, and the granting of the relief is a matter of sound judicial discretion, and where greater injury is likely to result to complainants from withholding the relief than to defendants from granting it, it may be allowed.<sup>6</sup> And the court may impose conditions, either for granting or refusing the relief, and may examine into the state of the litigation, the nature of the improvement and the extent of

<sup>2</sup> *Bacon v. Jones*, 4 Myl. & Cr., 436.

<sup>3</sup> *Parkhurst v. Kinsman*, 2 Halst. Ch., 600; U. S. Revised Statutes, 1874, § 4921. And see this section construed in *Yuengling v. Johnson*, 1 Hughes, 607. It has been held, under the provisions of the act of Congress, that some special equitable grounds for

relief must be presented in order to warrant an injunction against the infringement of a patent. See *Germain v. Wilgus*, 14 C. C. A., 501, 67 Fed., 597, and cases cited.

<sup>4</sup> *Continental S. S. Co. v. Clark*, 100 N. Y., 365, 3 N. E., 335.

<sup>5</sup> *Hat S. M. Co. v. Reinoehl*, 102 N. Y., 167, 6 N. E., 264.

<sup>6</sup> *Irwin v. Dane*, 4 Fish., 359.

the infringement, as well as the comparative inconvenience to the parties.<sup>7</sup>

§ 936. **Establishing right at law; recent patents.** The doctrine was formerly held in England that an injunction would not be allowed until the right had been established at law, but it would seem that the jurisdiction may now be exercised on showing color of title, coupled with an assertion of right which is not denied.<sup>8</sup> In this country, the jurisdiction exercised by the federal courts over actions in equity pertaining to patents being derived from statute, these courts do not in all cases require a verdict at law upon the title before granting even a final injunction.<sup>9</sup> And where the rights under the patent are clear, and the infringement is free from doubt, the patentee will not be compelled to proceed at law, but he may at once apply to the equity side of the court for relief.<sup>10</sup> And the allowance of a jury trial to test the question of the alleged infringement, on an application for a preliminary injunction, is not a condition precedent to the relief, nor is it to be regarded as a matter of right, but rather as resting in the sound discretion of the court.<sup>11</sup> But if the patent has never before been the subject of litigation, either at law or in equity, plaintiff may be required to give bond before the granting of the injunction.<sup>12</sup> And when there has been no adjudication at law sustaining the validity of the patent, the courts may require plaintiff to show an exclusive possession and exer-

<sup>7</sup> *Furbush v. Bradford*, 1 Fish., 317. *v. Grand Avenue R. Co.*, 33 Fed., 277.

<sup>8</sup> *Universities v. Richardson*, 6 Ves., 689. And see *Hicks v. Raincock*, Dick., 647.

<sup>9</sup> *Sickles v. Gloucester Manufacturing Co.*, 1 Fish., 222; *Sanders v. Logan*, 2 Fish., 167.

<sup>10</sup> *Potter v. Muller*, 2 Fish., 465; *Shelly v. Brannan*, 4 Fish., 198; *S. C.*, 2 Bissell, 315. See also *Wise*

<sup>11</sup> *Brooks v. Norcross*, 2 Fish., 661; *Potter v. Fuller*, *Ib.*, 251; *Motte v. Bennett*, *Ib.*, 642. And see *Motte v. Bennett* for an exhaustive history of the jurisdiction of equity in this class of cases, both in England and America.

<sup>12</sup> *Shelly v. Brannan*, 4 Fish., 199; *S. C.*, 2 Bissell, 315.

cise of the right before granting a preliminary injunction.<sup>13</sup> So where plaintiff's patent has been issued less than two months, and he has exercised no rights under it, and there has been no trial at law, an interlocutory injunction will be refused.<sup>14</sup> And notwithstanding the English rule that a final and perpetual injunction will not be granted when the answer denies the validity of the patent, without sending the parties to law to decide that question,<sup>15</sup> in this country it rests in the discretion of the court to grant the relief, with or without a trial at law.<sup>16</sup> It would seem, however, that a reasonable doubt as to complainant's right, or the validity of the patent, constitutes ground for requiring a trial at law.<sup>17</sup> So where there is no proof of public acquiescence and there has been no prior adjudication sustaining the patent and an action at law is pending between the parties, a bill for an injunction is properly dismissed.<sup>18</sup>

§ 937. **Province of injunction; relative convenience and inconvenience; solvency of defendant; bond.** The province of a preliminary injunction in a patent cause is to preserve the rights of the patentee pending the litigation of his title.

<sup>13</sup> *Hockholzer v. Eager*, 2 Sawy., 361; *Gutta Percha Co. v. Goodyear Co.*, 3 Sawy., 542.

<sup>14</sup> *Brown v. Hinkley*, 6 Fish., 370.

<sup>15</sup> *Bacon v. Jones*, 4 Myl. & Cr., 436; *Renard v. Levinstein*, 2 Hem. & M., 628.

<sup>16</sup> *Goodyear v. Day*, 2 Wal. Jr., 283; *Buchanan v. Howland*, 5 Blatch., 151.

<sup>17</sup> *Ogle v. Edge*, 4 Wash. C. C., 584. Washington, J., says: "I take the rule to be in cases of injunctions in patent cases, that where the bill states a clear right to the thing patented, which together with the alleged infringement is verified by affidavit, if he

has been in possession of it by having used or sold it, in part or in the whole, the court will grant an injunction and continue it till the hearing or further order, without sending the plaintiff to law to try his right. But if there appear to be a reasonable doubt as to the plaintiff's right, or to the validity of the patent, the court will require the plaintiff to try his title at law, sometimes accompanied with an order to expediate the trial, and will permit him to return for an account in case the trial at law should be in his favor."

<sup>18</sup> *Germain v. Wilgus*, 14 C. C. A., 561, 67 Fed., 597.

If his title has already been fully established, or is so clear as to preclude a reasonable doubt of its validity, a preliminary injunction may be granted, as in the case of a final injunction, regardless of the injury to defendant, but the case must be substantially free from doubt to warrant this course.<sup>19</sup> And an important consideration in the granting of preliminary injunctions is that of the relative convenience and convenience of the parties; and if it appears that the granting of the writ will result in great injury to the defendant as compared with the benefit accruing to the plaintiff, relief may be denied in the first instance; while, upon the other hand, if the plaintiff's rights will be greatly jeopardized by the withholding of the writ, with comparatively little corresponding advantage to the defendant, the injunction may properly be granted.<sup>20</sup> So where the granting of the writ will result in great inconvenience and injury to the defendant or to the public generally as compared with any benefit which may come to the plaintiff and it clearly appears that the defendant is perfectly solvent and abundantly able to respond in damages for any judgment which may be rendered against him, a preliminary injunction should be denied.<sup>21</sup> On the contrary, where the court, upon balancing the relative convenience and inconvenience to the parties, denies or dissolves a preliminary injunction, it may, in so doing, require of the defendant the filing of a bond conditioned for the payment of any damages which may be assessed upon the final hearing.<sup>22</sup> But where the granting of the writ

<sup>19</sup> *Morris v. Lowell Manufacturing Co.*, 3 Fish., 67. And see *Howe v. Morton*, 1 Fish., 586.

<sup>20</sup> *Blount v. Societe Anonyme*, 3 C. C. A., 455, 53 Fed., 98; *Consolidated R. M. Co. v. Richmond C. M. Works*, 40 Fed., 474; *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed., 302; *National H.-P. M. Co. v. Hedden*, 29 Fed., 147; *Morris v.*

*Lowell Mfg. Co.*, 3 Fish., 67. Upon the subject generally, see, *ante*, § 13.

<sup>21</sup> *Southwestern B. E. L. & P. Co. v. Louisiana E. L. Co.*, 45 Fed., 893; *Whitcomb v. Girard Coal Co.*, 47 Fed., 315.

<sup>22</sup> *Consolidated R. M. Co. v. Richmond C. M. Works*, 40 Fed., 474.

would be more likely to produce than to prevent irreparable mischief, neither an absolute nor a conditional injunction will be allowed.<sup>23</sup> And where a patent is sustained on appeal and the decree of the lower court is reversed and the cause remanded for future proceedings not inconsistent with the opinion, an injunction will not be granted as a matter of course, but it still rests in the sound discretion of the chancellor as to whether or not the writ shall issue.<sup>24</sup> In all such cases, there being an element of discretion which enters largely into the consideration of the motion for a preliminary injunction, the patentee is only entitled to the best judgment of the court upon a question of judicial discretion, and not absolutely to the injunction on any given state of facts.<sup>25</sup>

§ 938. **Plaintiff's right must be free from doubt; other considerations governing preliminary injunctions.** An interlocutory injunction against the infringement of a patent will not be allowed unless complainant's title and defendant's infringement are either admitted or are so clear and palpable that the court can entertain no doubt on the subject.<sup>26</sup> And whenever, upon the facts presented, a fair and reasonable doubt exists as to whether defendant has actually been guilty of an infringement, or where the right is, in point of law, at least doubtful, and the questions involved are exclusively for a jury, or where a reasonable doubt exists as to the originality and novelty of complainant's invention, or as to the substantial identity between the articles manufactured by defendant and those of complainant, a preliminary injunction will be withheld.<sup>27</sup> So when the issue in

<sup>23</sup> *Day v. Candee*, 3 Fish., 9.      *Anonyme*, 3 C. C. A., 455, 53 Fed.,

<sup>24</sup> *In re Chicago Sugar Refining* 98; *Blakey v. National Mfg. Co.*, 31 C. C. A., 221, 87 Fed., 750.      37 C. C. A., 27, 95 Fed., 136.

<sup>25</sup> *Potter v. Whitney*, 3 Fish., 77;      <sup>27</sup> *Dodge v. Card*, 2 Fish., 116; *S. C.*, 1 Lowell, 87.      *Sullivan v. Redfield*, 1 Paine, 441;

<sup>26</sup> *Parker v. Sears*, 1 Fish., 93;      *Winans v. Eaton*, 1 Fish., 181; *American Co. v. City of Elizabeth*, 4 Fish., 189; *Blount v. Societe* 154; *Cross v. Livermore*, 9 Fed.,



the cause as to the validity of the patent is new, and not only is the novelty of the invention denied, but a fair doubt as to its novelty is raised by affidavits introduced to show a prior use, and no public acquiescence in plaintiff's claim is shown, equity will refuse an injunction *in limine*.<sup>28</sup> So, too, if it does not satisfactorily appear that complainant is the first and sole inventor of the improvements claimed by his patent, the court will not interfere in the first instance.<sup>29</sup> And where a preliminary injunction has already been granted, but the evidence is doubtful as to the originality of the patent, the injunction may be dissolved, defendants being required meanwhile to keep an account of their sales.<sup>30</sup> And it may be asserted generally that where there has been no prior adjudication either at law or in equity sustaining the validity of a patent and no public acquiescence is shown upon which the presumption of its validity may be based, and where there is doubt as to the patentability of the article and the patent itself is of very recent date, and where the question of infringement is involved in doubt and is not established by clear and satisfactory evidence, and it appears that the defendant is abundantly able to respond in damages, all of these considerations, taken individually or collectively, afford sufficient ground for refusing an injunction in the first instance.<sup>31</sup> And where the

607; *Bradley & H. M. Co. v. Charles Parker Co.*, 17 Fed., 240.

<sup>28</sup> *Mowry v. Grand Street & N. R. Co.*, 10 Blatch., 89; S. C., 5 Fish., 586.

<sup>29</sup> *Thomas v. Weeks*, 2 Paine, 92.

<sup>30</sup> *Sheriff v. Coates*, 1 Russ. & M., 159.

<sup>31</sup> *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A., 100, 56 Fed., 718; *George Ertel Co. v. Stahl*, 13 C. C. A., 29, 65 Fed., 517; *Williams v. Brietling M. Mfg. Co.*,

23 C. C. A., 171, 77 Fed., 285; *Wilson v. Consolidated S. Co.*, 31 C. A., 533, 88 Fed., 286; *Smith v. Meriden Britannia Co.*, 39 C. C. A., 32, 97 Fed., 987; *Reed Mfg. Co. v. Smith & W. Co.*, 46 C. C. A., 601, 107 Fed., 719; *Newhall v. McCabe H. Mfg. Co.*, 60 C. C. A., 629, 125 Fed., 919; *National H.-P. M. Co. v. Hedden*, 29 Fed., 147; *Dickerson v. De La Vergne Ref. Co.*, 35 Fed., 143; *Raymond v. Boston Woven Hose Co.*, 39 Fed., 365; *Johnson*

answer denies all the material allegations of the bill and especially those of infringement and charges want of novelty and prior use and is supported by affidavits strongly corroborative of these charges, a preliminary injunction should be denied.<sup>32</sup> And where the question as to the validity of the patent is in serious doubt, preliminary relief may be refused although the fact of infringement is not denied by the answer or otherwise put in issue.<sup>33</sup> And since the object of a preliminary injunction is to prevent pecuniary damage, it is held that, where there is no showing made in the bill that the plaintiff's patent is a source of profit to him, an injunction should be denied *in limine*, although the bill may be sufficient to justify a perpetual injunction upon final hearing, the right to the ultimate relief in such case not being dependent upon the amount or magnitude of the injury to the plaintiff.<sup>34</sup>

§ 939. **Controversy as to right will bar relief.** So long as there is a substantial controversy as to the equities of the parties, the court will not dispose of those equities upon a motion for an interlocutory injunction, which does not permit the questions involved to be inquired of and defined accurately according to the approved usages of chancery, and interlocutory relief will be refused, especially when the granting of the application might seriously imperil defendant's rights, and its refusal will not injure plaintiff.<sup>35</sup> And if the patent itself is of recent date, and the specifications are obscure and the proof of infringement is meagre and

*v. Aldrich*, 40 Fed., 675; *Kane v. Huggins Cracker Co.*, 44 Fed., 287; *Dietz v. Ham Mfg. Co.*, 47 Fed., 320; *Palmer Pneumatic Tire Co. v. Newton Rubber Works*, 73 Fed., 218; *Richmond M. Co. v. De Clyne*, 90 Fed., 661; *Planters Compress Co. v. More & Co.*, 106 Fed., 500; *Bradley v. Eccles*, 120 Fed., 947.

<sup>32</sup> *Standard Paint Co. v. Reynolds*, 43 Fed., 304.

<sup>33</sup> *Nilsson v. Jefferson*, 78 Fed., 366.

<sup>34</sup> *Wirt v. Hicks*, 46 Fed., 71.

<sup>35</sup> *Smith v. Cummings*, 1 Fish., 152; *Pullman v. Baltimore & O. R. Co.*, 4 Hughes, 236; S. C., 5 Fed., 72.

unsatisfactory, an injunction will not be allowed even upon final hearing. But in such case the bill may be retained and complainant required to bring an action at law within a reasonable time.<sup>36</sup> So when plaintiff's patent is recent and its validity is disputed by defendants, and the facts upon which plaintiff's claim to an injunction is based are not clearly established and are involved in much doubt, the court may properly refuse an interlocutory injunction.<sup>37</sup> And although plaintiff's rights under the patent may be clear, it is nevertheless error to grant a preliminary injunction upon a mere allegation of infringement where no proof of actual infringement is presented.<sup>38</sup>

§ 940. **Presumptions necessary to warrant relief.** The presumptions in favor of the novelty of a patent, sufficient to constitute the foundation for a preliminary injunction, may be some or all of the following: the oath of the patentee that he was the original inventor; the granting of the patent after full investigation; undisturbed enjoyment by the patentee of the exclusive rights granted by the patent, coupled with acquiescence on the part of the public; direct adjudications at law or in equity establishing its validity, and prior injunctions restraining its infringement. When such grounds of presumption co-exist in favor of the novelty of a patented invention, an injunction will not be refused, or, if granted, will not be dissolved except upon the most conclusive evidence impeaching the patent.<sup>39</sup>

§ 941. **Acquiescence by the public; exclusive enjoyment.** Acquiescence on the part of the public in complainant's use

<sup>36</sup> *Muscan Hair Mfg. Co. v. American Hair Mfg. Co.*, 1 Fish., 320.

<sup>37</sup> *McGuire v. Eames*, 15 Blatch., 312.

<sup>38</sup> *Seiler v. Fuller & Johnson Mfg. Co.*, 42 C. C. A., 386, 102 Fed., 344.

<sup>39</sup> *Hussey v. Whiteley*, 2 Fish.,

120. And see *Orr v. Littlefield*, 1 Woodb. & M., 13; *Ogle v. Edge*, 4 Wash. C. C., 584; *Doughty v. West*, 2 Fish., 553; *Grover Co. v. Williams*, 2 Fish., 133; *Blount v. Societe Anonyme*, 3 C. C. A., 455, 53 Fed., 98.

of his patented invention is an important consideration in determining a motion for an injunction against the infringement of a patent. And where the party aggrieved can show an undisturbed user and possession for a reasonable time he is entitled to the relief.<sup>40</sup> And this exclusive possession, if of sufficient duration, may warrant the relief, even in the absence of any previous adjudications in favor of the validity

<sup>40</sup> *Orr v. Littlefield*, 1 Woodb. & M., 13; *Hill v. Thompson*, 3 Meriv., 622; *Stevens v. Keating*, 2 Ph., 333; *Ogle v. Edge*, 4 Wash. C. C., 584; *Foster v. Moore*, 1 Curt. C. C., 279; *Isaacs v. Cooper*, 4 Wash. C. C., 259; *Washburn v. Gould*, 3 Story, 156, 169; *Bickford v. Skewes*, Web. P. C., 211; *Good-year v. The Central R. R. of New Jersey*, 1 Fish., 626; *Potter v. Holland*, Ib., 382; *Blount v. Societe Anonyme*, 3 C. C. A., 455, 53 Fed., 98. "The reason for the presumption in favor of the validity of the grant is the acquiescence of the public in the exclusive right of the patentee, which, it may reasonably be assumed, would not exist unless the right was well founded." Story, J., in *Foster v. Moore*, *supra*. The principles upon which a court of equity will interfere for the protection of a patent before the right has been established at law are well stated by the Vice Chancellor in *Caldwell v. Vanlissengen*, 9 Hare, 415, as follows: "The question whether the court will interfere to protect a patentee before he has established his right at law, or will suspend its interference until the right at law has been established, appears to me to depend upon very simple principles. It is part of the duty of

this court to protect property pending litigation; but when it is called upon to exercise that duty, the court requires some proof of title in the party who calls for its interference. In the case of a new patent, this proof is wanting; the public whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the court therefore refuses to interfere until his right has been established at law. But in a case where there has been long enjoyment under the patent (the enjoyment of course including use), the public have had the opportunity of contesting the patent; and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good; and the court therefore interferes before the right is established at law. In the present case, I think that the plaintiffs have proved such a case of enjoyment under the patent, and of their title having been maintained at law against the several attempts which have been made to impeach it, that the court is bound at once to interfere for their protection, unless there are other sufficient grounds for withholding its interference."

of the patent.<sup>41</sup> But in order to take the place of such prior adjudications, the acquiescence must be continued so long and under such circumstances as to induce the belief that infringement would have occurred were it not for a settled belief upon the part of the public that the patent was valid and must be respected.<sup>42</sup> While the courts have not attempted to fix any definite rule as to the length of time during which the exclusive use and enjoyment of the right must have been continued, it must be sufficient to raise a presumption in favor of the validity of the patent.<sup>43</sup> And such presumption is greatly strengthened by former adjudications in support of the patent.<sup>44</sup> So when plaintiff has long been in the enjoyment of his rights under the patent, and the question of infringement is free from doubt, it is proper to grant an injunction.<sup>45</sup> And when the infringement is clear, and plaintiffs have proven an uninterrupted use for many years, and have established their patent in an action at law, and have also procured its extension, their right to an injunction is clear and undoubted.<sup>46</sup> So when plaintiff has for a long period been in exclusive possession under his patent, with the acquiescence of the public in his rights, and the novelty of his invention is not questioned, except by the claim that it was anticipated by certain patents which have been repeatedly construed by the patent office as not anticipating plaintiff's invention, in which construction the court concurs, it is proper to grant the injunction.<sup>47</sup>

<sup>41</sup> *Goodyear v. Central R. R. of New Jersey*, 1 Fish., 626.

<sup>42</sup> *Consolidated Fastener Co. v. American Fastener Co.*, 94 Fed., 523.

<sup>43</sup> *Potter v. Muller*, 2 Fish., 465. And it has been held that such possession for eight years was sufficient evidence, *prima facie*, to warrant an injunction previous to a trial at law. *Foster v. Moore*, 1 Curt. C. C., 279.

<sup>44</sup> *Potter v. Muller*, 2 Fish., 465; *Potter v. Holland*, 1 Fish., 382.

<sup>45</sup> *Chase v. Wesson*, 6 Fish., 517; S. C., 1 Holmes, 274.

<sup>46</sup> *Cook v. Ernest*, 5 Fish., 396; S. C. *sub nom.* *McComb v. Ernest*, 1 Woods, 195.

<sup>47</sup> *Miller v. Androscoggin Pulp Co.*, 5 Fish, 340; S. C., 1 Holmes, 142.



§ 942. **The doctrine further considered.** Where, however, plaintiff's allegations of exclusive possession are met and avoided by averments and proof of a more peaceable and exclusive possession by defendants, under patents purchased and used by them, no injunction will be allowed.<sup>48</sup> And when plaintiff's patent has never been adjudged valid in any action, mere lapse of time is not considered sufficient evidence of public acquiescence in and recognition of his right to warrant an injunction; but the acquiescence must be accompanied by circumstances indicating that it would not have occurred had any reasonable doubt existed as to the validity of the patent.<sup>49</sup> And when plaintiff fails to show any exclusive possession of the invention for a considerable length of time, accompanied by acquiescence on the part of the public, and when he shows no decree or judgment sustaining his patent and no irreparable injury is shown as likely to result if the injunction is refused, the court will decline to interfere *in limine*.<sup>50</sup>

§ 943. **Prior use of plaintiff's invention.** Upon a motion for a preliminary injunction to restrain the violation of a patent, an affidavit filed by defendant in opposition to the motion, alleging upon information and belief that plaintiff's invention was used and sold long prior to his patent, will not avail; since if defendant has such information he should disclose it fully, and he can not be permitted to swear merely to his conclusion and withhold the particulars as to the information. But when a prior use of the same article is afterward shown by affidavit in detail, and specimens of the article are produced, such doubt is thrown over the question of novelty as to entitle defendants to a dissolution of the injunction.<sup>51</sup>

<sup>48</sup> Parker v. Sears, 1 Fish., 93.

<sup>49</sup> Guidet v. Palmer, 10 Blatch., 217; S. C., 6 Fish., 82. And see this case as to the facts upon which the court may refuse an interlocutory injunction against the in-

fringement of a patent when the public interest is concerned.

<sup>50</sup> Earth Closet Co. v. Fenner, 5 Fish., 15.

<sup>51</sup> Young v. Lippman, 9 Blatch., 277; S. C., 5 Fish., 230.

§ 944. **Unsupported theory insufficient; English rule.** It is not regarded as proper to sustain a motion for a preliminary injunction in a patent cause upon a theory of plaintiff's invention, which, although it may be true, is not supported by affidavits.<sup>52</sup> And under the practice of the English Court of Chancery, a plaintiff seeking to restrain the infringement of his patent was required to state that his invention was new, or had never been practiced in the kingdom at the date of his patent.<sup>53</sup>

§ 945. **Repeal of patent; expiration; death of defendant.** Upon a bill to procure the repeal of an interfering patent it is competent for the court to grant an injunction in connection with the other relief sought by the action.<sup>54</sup> But in an action brought by the United States to repeal letters patent for an invention, an injunction will not be granted *pendente lite* to restrain defendant from prosecuting actions for infringement, since the government has no interest in such actions.<sup>55</sup> And where the bill is not filed until after the expiration of the patent it can not be maintained as a bill for an injunction.<sup>56</sup> And where the record shows the death of defendant, if there is no proof of infringement by his executor, no injunction will be granted against such executor.<sup>57</sup>

§ 946. **Enjoining patentee from bringing or threatening actions for infringement.** Since the granting of letters patent confers upon the patentee the right to institute actions for infringement of his patent, it follows that a court of equity will not, in the absence of bad faith, interfere by injunction to restrain him from bringing such actions before

<sup>52</sup> American Co. v. Sullivan Co., 14 Blatch., 119.

<sup>53</sup> Sturz v. De La Rue, 5 Russ., 322. And see Hill v. Thompson, 3 Merw., 622.

<sup>54</sup> Ayling v. Hull, 2 Cliff., 494.

<sup>55</sup> United States v. Colgate, 22 Blatch., 412.

<sup>56</sup> Vaughn v. Central Pacific R. Co., 4 Sawy., 280. And see Root v. Railway Co., 105 U. S., 189. And see, *post*, § 891 *et seq*.

<sup>57</sup> Draper v. Hudson, 6 Fish., 327.

his patent has been adjudged to be invalid.<sup>58</sup> And a defendant, who has been found guilty of infringing letters patent can not restrain the patentee from interfering with customers of such defendant in the use of the manufactured article.<sup>59</sup> So, in the absence of wilful or malicious motive, complainant who has commenced an action for an injunction against infringement will not be enjoined from sending letters and circulars to defendant's customers warning them to cease the use of the alleged infringing article and threatening them with suit if they do not desist.<sup>60</sup> But a court of equity may, by petition filed in an action for an injunction against infringement of a patent, enjoin complainant from

<sup>58</sup> *Asbestos Felting Co. v. U. S. & F. S. Felting Co.*, 13 Blatch., 453; *Kelley v. Ypsilanti Mfg. Co.*, 44 Fed., 19, 10 L. R. A., 686; *Computing Scale Co. v. National C. S. Co.*, 79 Fed., 962. In *Kelley v. Ypsilanti Mfg. Co.*, 44 Fed., 19, *supra*, complainant had filed a bill for an injunction against infringement of a patent and had also commenced three suits in other courts against three of defendant's customers and was about to commence others, which defendant was bound to defend. Complainant had also sent numerous letters to defendant's customers informing them that they were infringing and threatening suit if they did not cease. Defendant filed a petition herein seeking to enjoin such actions pending and prospective. As to the three suits already begun, it was held that complainant should not be enjoined for three reasons: first, because those actions had been begun before this suit; second, because comity required that the application should be made in

those courts; and, third, because, complainant being a non-resident of this district, an injunction could be enforced only by staying proceedings in this court, while complainant might still elect to proceed in the other courts, which would be under no obligation to take notice of the injunction in this action. As to the actions not yet begun, it was held that the defendant was not entitled to an injunction, this being by analogy to the rule that the recovery of damages from the manufacturer of an infringing article does not preclude a recovery also from the manufacturer's vendee for his profits in reselling the article. As to the letters and notices which complainant was sending to defendant's customers, it was held that this afforded no ground for an injunction in the absence of evidence showing that it was done wilfully or maliciously.

<sup>59</sup> *Tuttle v. Matthews*, 24 Blatch., 16.

<sup>60</sup> *Kelley v. Ypsilanti Mfg. Co.*,

prosecuting actions against purchasers and users of the alleged infringing article where it appears clearly that such suits are oppressive and vexatious and are brought for the purpose of harassing and annoying the defendant.<sup>61</sup> But when a patentee, as a condition of obtaining an extension of his patent, files a disclaimer as to a part of his invention, and after procuring the extension he surrenders his patent and procures a re-issue embracing the disclaimed invention, he can not maintain a bill to enjoin its infringement.<sup>62</sup>

§ 947. **Invention must stand on its own merits.** The fact that plaintiff, who seeks an injunction against the infringement of his patent, does not or can not make his patented article without using the apparatus covered by another patent under which defendant claims, can not be considered by the court upon an application for an injunction, since the case of each invention must be treated independently upon its own merits when presented for adjudication.<sup>63</sup>

§ 948. **Plea that defendant was only a salesman.** The pendency of a plea by defendant to a bill seeking an injunction to restrain him from infringing plaintiff's patent, in which he avers that he acted only as a salesman in selling the patented article, having no interest in the business in question except as an employe, will not prevent the granting of an injunction; nor will the court be prevented from granting the relief by the fact that such plea has been set down for hearing, but has not yet been heard.<sup>64</sup>

§ 949. **Violation of injunction.** A defendant who has been enjoined from using plaintiff's patent is not at liberty to disregard the injunction by merely taking certain parts and

44 Fed., 19, 10 L. R. A., 686; New York Filter Co. v. Schwarzwald, 62 Leggett v. Avery, 101 U. S., 256.

58 Fed., 577; Computing Scale Co. v. National C. S. Co., 79 Fed., 962. 63 Young v. Lippman, 9 Blatch., 277; S. C., 5 Fish., 230.

61 National Cash Register Co. v. Boston C. I. & R. Co., 41 Fed., 51. 64 Maltby v. Bobo, 14 Blatch., 53.

improvements from his machine which he conceives to be covered by plaintiff's patent, and then to continue the manufacture of the patented article. Nor is the fact that he has thus acted under the advice of counsel a sufficient justification for thus disobeying the injunction, the proper course being to take the judgment of the court upon the matter by a motion to dissolve, or otherwise.<sup>65</sup> But where, after a final decree restraining an infringement of plaintiff's patent, defendants manufacture a machine which had not been made or sold before the decree in the cause, and the differences between which and plaintiff's invention are not merely colorable but present questions which have not before been raised between the parties, the court will not decide such questions upon a motion for an attachment for a violation of the injunction, but will leave it to be determined by an original action for that purpose.<sup>66</sup>

§ 950. **Property in manufactured articles; foreign sovereign.** Notwithstanding the rights and privileges of the patentee, it is held that the property in articles which are manufactured in violation of a patent is in the infringer. The court will not, therefore, interfere by injunction to prevent a foreign sovereign from removing his property from the country upon the ground that such property infringes plaintiff's patent. And this is true, even though such sovereign has voluntarily made himself a party defendant to the action, and submitted to the jurisdiction of the court, since the courts will not interfere with the property of foreign sovereigns.<sup>67</sup>

§ 951. **Master of vessel enjoined from using patented machinery.** A master of a vessel who is in possession of the vessel, which is fitted with machinery which is clearly

<sup>65</sup> *Hamilton v. Simons*, 5 Bissell, 77.

<sup>67</sup> *Vavasseur v. Krupp*, 9 Ch. D., 351.

<sup>66</sup> *Liddle v. Cory*, 7 Blatch., 1.



an infringement of plaintiff's patent, may be enjoined from using such machinery, even though the vessel was so fitted before he took command, and although he is not a part owner of the vessel.<sup>68</sup>

§ 952. **Effect of defendant's consent to injunction.** When after the argument of a motion for an injunction in a patent cause, and after the motion is submitted, defendants file their written consent to the granting of the motion, the court will grant the injunction if desired upon such consent, but will not express any opinion upon the merits of the action, there being no longer any real contest between the parties.<sup>69</sup>

<sup>68</sup> *Adair v. Young*, 12 Ch. D., 13.

<sup>69</sup> *American M. P. Co. v. Vail*, 15 Blatch., 315.

## II. EFFECT OF PRIOR ADJUDICATION.

- § 953. The general doctrine stated.
- 954. Applications of the doctrine.
- 955. Effect on appeal.
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§ 953. **The general doctrine stated.** Previous adjudications in favor of the validity of the patent whose protection is sought by injunction afford strong foundation for the relief, and are entitled to great weight in determining an application for a preliminary injunction. And it may be laid down as a rule of frequent and uniform application that where the validity of the patent in question has been sustained by the adjudications of other courts upon final hearing after strenuous and *bona fide* litigation, the only question open to the consideration of the court upon an application for an interlocutory injunction is that of infringement, all other defenses being postponed until the final hearing, unless the defendant adduces new evidence of so persuasive a character as to lead to the conviction that, had it been presented in the other litigation, the result would in all probability have been different.<sup>1</sup> The rule is

<sup>1</sup> *Electric Mfg. Co. v. Edison Electric Co.*, 10 C. C. A., 106, 61 Fed., 834; *Philadelphia T., S. & I. Co. v. Edison Electric Light Co.*, 13 C. C. A., 40, 65 Fed., 551; *Southern Pacific Co. v. Earl*, 27 C. C. A., 185, 82 Fed., 690; *Putnam v. Keystone B. S. Co.*, 38 Fed., 234; *Thompson v. Donnell Mfg. Co.*, 40 Fed., 383; *Edison Electric L. Co. v. Beacon V. P. & E. Co.*, 54 Fed., 678; *Sawyer Spindle Co. v. Turner*, 55 Fed., 979; *White Dental Mfg. Co. v. Johnson*, 56 Fed., 262; *Allington Mfg. Co. v. Lynch*, 71 Fed., 409; *Bowers v. Pacific Coast D. & R. Co.*, 81 Fed., 569; *New York Filter Mfg. Co. v. Jackson*, 91 Fed., 422; *Robertson v. Hill*, 6 Fish., 485; *Odorless Excavating Co. v. Lauman*, 4 Woods, 129; *Orr v. Littlefield*, 1 Woodb. & M., 13; *Woodworth v. Hall*, Ib., 248; *Woodworth v. Edwards*, 3 Woodb. & M., 120; *Gibson v. Van*

based not only upon the comity and respect which should be observed between courts of co-ordinate jurisdiction, but also upon the very strong presumption which arises in favor of the validity of the patent as the result of the solemn judgment of the other court. And where such prior adjudication has been affirmed upon appeal, it affords still stronger

Dresar, 1 Blatch., 532; Potter v. Holland, 4 Blatch., 238; Goodyear v. Central R. R. of New Jersey, 1 Fish., 626; Parker v. Brant, *Ib.*, 58; Potter v. Fuller, 2 Fish., 251; Potter v. Whitney, 3 Fish., 77; S. C., 1 Lowell, 87; Conover v. Mers, 3 Fish., 386; Goodyear v. Evans, *Ib.*, 390; Goodyear v. Berry, *Ib.*, 439; Goodyear v. Rust, *Ib.*, 456; Thayer v. Wales, 9 Blatch., 170; S. C., 5 Fish., 130. Thus, it is said that "where complainant has made out, not merely a grant of the patent, but possession and use and sale under it for some time undisturbed, and besides this a recovery against other persons using it, the courts have invariably held that such a strong color of title shall not be deprived of the benefit of an injunction, till a full trial on the merits counteracts or annuls it." Per Woodbury, J., in Orr v. Littlefield, *supra*. And in Edison Electric L. Co. v. Beacon V. P. & E. Co., *supra*. Colt, J. says: "The general rule is that where the validity of a patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open on motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement, the consideration of other

defenses being postponed until final hearing. The only exception to this general rule seems to be where the new evidence is of such a conclusive character that, if it had been introduced in the former case, it probably would have led to a different conclusion. The burden is on the defendant to establish this, and every reasonable doubt must be resolved against it." To the same effect, see United Indurated Fibre Co. v. Whippany Mfg. Co., 83 Fed., 485, although this case was reversed upon other grounds in 30 C. C. A., 615, 87 Fed., 215. As to the effect of an adjudication sustaining the validity of the patent upon an interference in the patent office upon the right to restrain an infringement, see Pentlarge v. Berston, 14 Blatch., 352; Barr Company v. New York & N. H. A. S. Co., 24 Blatch., 566. And it is held that an adjudication in favor of the patent in an interference proceeding will justify a preliminary injunction as against the defendant in those proceedings and those in privity with him. Smith v. Halkyard, 16 Fed., 414, and cases cited. But such an adjudication will not avail as against strangers. Dickerson v. Machine Co., 35 Fed., 143; Wilson v. Consolidated S. Co., 31 C. C. A., 533, 88 Fed., 286.

ground for a preliminary injunction.<sup>2</sup> And of still greater weight is the adjudication where it has finally been sustained by the Supreme Court of the United States.<sup>3</sup>

§ 954. **Applications of the doctrine.** In accordance with the rule as thus announced, it is held that where the patent has been sustained on a full hearing against other defendants, and the infringement is clear, and especially where the precise form of machine used by defendant has been previously passed upon by the court on the question of infringement, complainant is entitled to have his rights promptly protected by injunction.<sup>4</sup> So where complainant relies upon prior adjudications in support of his patent as a ground for relief against its infringement, although it is competent for defendant to show that the title was not fairly in controversy in the former cases, or that some material fact was overlooked, yet the considerations which would justify the court in renewing the discussion of the patentee's title, which is already *res adjudicata*, should be such as, if presented to the court after a trial at law, would have sufficed to set aside a verdict.<sup>5</sup> So when plaintiff shows long enjoyment under his patent, with repeated adjudications at law sustaining its validity, he is entitled to an injunction against its infringement.<sup>6</sup> And where the validity of plaintiff's patent has been established by repeated adjudications, and it is manifest that neither the public nor the defendants will suffer any inconvenience from the issuing of the writ, the

<sup>2</sup> *Bresnahan v. Tripp G. L. Co.*, 19 C. C. A., 237, 72 Fed., 920, where the prior adjudication was of the same court; *Beach v. Hobbs*, 34 C. C. A., 248, 92 Fed., 146; *Norton v. Eagle Automatic Can Co.*, 57 Fed., 929; *Tannage Patent Co. v. Donnanan*, 75 Fed., 287; *Tannage Patent Co. v. Adams*, 77 Fed., 191; *American S. P. Co. v. Burgess S. F. Co.*, 103 Fed., 975.

<sup>3</sup> *American Purifier Co. v. Christian*, 3 Banning & A., 42, 51; *American Bell T. Co. v. Southern T. Co.*, 34 Fed., 795; *American Bell T. Co. v. McKeesport T. Co.*, 57 Fed., 661.

<sup>4</sup> *Conover v. Mers*, 3 Fish., 386.

<sup>5</sup> *Parker v. Brant*, 1 Fish., 58.

<sup>6</sup> *Newall v. Wilson*, 2 DeG., M. & G., 282.

fact that it is not alleged that defendants are insolvent, or that plaintiffs would suffer irreparable injury by waiting until a final hearing, constitutes no bar to the relief.<sup>7</sup> And a prior adjudication in favor of the validity of a patent affords sufficient ground for a preliminary injunction notwithstanding the subsequent reversal of such prior judgment, provided the reversal was upon grounds which in no way went to the validity of the patent.<sup>8</sup> And where the patent has been several times sustained by other courts, plaintiff will not be deprived of the right to a preliminary injunction by the filing by defendants of *ex parte* affidavits setting up newly discovered evidence where it appears that defendants were closely allied with the defendants in the other litigation and that such evidence was to a certain extent known to those defendants.<sup>9</sup> And the effect of a prior adjudication in favor of the validity of a patent will not be overcome upon a motion for a preliminary injunction by new evidence where it appears from the opinion of the court in the former litigation that the result would have been the same had such evidence been there presented.<sup>10</sup> But where there are two conflicting prior adjudications, one sustaining and the other denying the validity of plaintiff's patent, the court is at liberty to examine the reasoning of the two decisions and to adopt that which impresses it as correct.<sup>11</sup> Moreover, it should be borne in mind that a prior adjudication in favor of a patent is not an indispensable condition to the granting of a preliminary injunction, and the relief may be granted without such an adjudication where the plaintiff makes any other showing by which the validity of his patent is clearly established.<sup>12</sup> And where there has

<sup>7</sup> *Goodyear v. Central R. R. of New Jersey*, 1 Fish., 626.

<sup>8</sup> *Keyes v. Pueblo S. & R. Co.*, 31 Fed., 560. And see *Wells v. Gill*, 6 Fish., 89.

<sup>9</sup> *Brush Electric Co. v. Accumulator Co.*, 50 Fed., 833.

<sup>10</sup> *Sawyer Spindle Co. v. Taylor*, 56 Fed., 110.

<sup>11</sup> *Pelzer v. Newhall*, 98 Fed., 684.

<sup>12</sup> *McDowell v. Kurtz*, 23 C. C. A., 119, 77 Fed., 206; *Cary Mfg. Co. v. Haven*, 58 Fed., 786.



been a prior adjudication not in favor of plaintiff's patent but to the effect that the defendant's vendor had the legal right to manufacture and sell the alleged infringing article, a preliminary injunction should be denied.<sup>13</sup>

§ 955. **Effect on appeal.** Upon an appeal from a preliminary injunction based upon a prior adjudication sustaining the validity of a patent, the court of appeals will ordinarily consider the case from the same standpoint as that from which it was viewed in the court below, and, in the absence of some controlling reason to the contrary, will accordingly give to such adjudication the same force and weight as were accorded it in the lower court; although upon an appeal from a final decree, the court would not hesitate to disregard the decision in which the prior judgment was rendered.<sup>14</sup> Notwithstanding the rule as thus announced, the reviewing court, upon such an interlocutory appeal, will not feel as firmly bound by such adjudication as the lower court and it may accordingly re-examine such prior rulings and if convinced that they are erroneous it may disregard them and accord to the patent the construction which seems to it to be the proper one.<sup>15</sup> Nor is the court of appeals of one circuit bound to follow the prior adjudication of another court of appeals, especially where the actual questions are not involved or if convinced that such prior decision is erroneous.<sup>16</sup>

<sup>13</sup> Edison Electric L. Co. v. Citizens E. L. Co., 64 Fed., 491.

<sup>14</sup> American Paper P. & B. Co. v. National F. B. & P. Co., 2 C. C. A., 165, 51 Fed., 229, 1 U. S. App., 283; Duplex Printing-Press Co. v. Campbell Printing-Press & Mfg. Co., 16 C. C. A., 220, 69 Fed., 250; Thomson-Houston Electric Co. v. Ohio Brass Co., 26 C. C. A., 107, 80 Fed., 712; Consolidated Fastener

Co. v. Littauer, 28 C. C. A., 133, 84 Fed., 164.

<sup>15</sup> National Cash Register Co. v. American Cash Register Co., 3 C. C. A., 559, 53 Fed., 367; Thomson-Houston Electric Co. v. Hoosick Ry. Co., 27 C. C. A., 419, 82 Fed., 461.

<sup>16</sup> Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S., 485, 20 Sup. Ct. Rep., 708.

§ 956. **Extension and re-issue.** The fact that the patent is extended after the adjudications sustaining its validity does not affect the application of the doctrine under consideration. Thus, where a patent has been sustained during its original term by four different adjudications, one of them being against the same defendant for the use of the same process involved in the application for the injunction, after the extension of the patent the novelty of the invention and the validity of the patent are regarded as sufficiently established by the prior adjudications.<sup>17</sup> But the existence of a substantial doubt as to the identity of the invention covered by the re-issue with that contained in the original is sufficient ground for denying the motion to restrain the infringement of the re-issue.<sup>18</sup>

§ 957. **Trial at law; award.** If the result of a trial at law to determine the right is 'satisfactory to a court of equity, it may at once interfere for the protection of the patent, even though the defendant is about to take further steps at law.<sup>19</sup> And the effect of a verdict and judgment sustaining the patent in an action at law upon a bill in equity to restrain an infringement is to make out a *prima facie* case of title in the plaintiff and of infringement by defendants.<sup>20</sup> And an award sustaining the validity of the patent, on a reference being had in a trial at law, is entitled to the same consideration as a verdict.<sup>21</sup>

§ 958. **Limitations upon the doctrine.** Notwithstanding the great weight which, as we have already seen, the courts attach to prior adjudications sustaining the validity of a

<sup>17</sup> Tilghman v. Mitchell, 4 Fish., 615; S. C., 9 Blatch., 18. And see Clum v. Brewer, 2 Curt. C. C., 506, where the same doctrine is maintained, although the relief was refused on other grounds.

<sup>18</sup> Poppenhusen v. Falke, 4 Blatch., 493.

<sup>19</sup> Boulton v. Bull, 3 Ves., 140; Bridson v. Benecke, 12 Beav., 7.

<sup>20</sup> Wells v. Gill, 6 Fish., 89.

<sup>21</sup> Lister v. Eastwood, 26 L. T., 4.

patent, the recovery of a verdict for plaintiff, in an action at law upon a patent, is not necessarily conclusive upon his right to an injunction, and the court may, upon such application, consider the true interpretation of the patent, irrespective of the former verdict,<sup>22</sup> especially where a writ of error is pending to the proceedings at law.<sup>23</sup> And an exception to the rule has been recognized in cases where new evidence has been adduced by the defendant in opposition to the patent which is of such a clear and conclusive character as to lead to the conviction that, had it been presented in the prior proceeding, the result would, in all probability, have been different; and in such case, a preliminary injunction may be denied, notwithstanding the prior adjudication.<sup>24</sup> So where a preliminary injunction has already been granted upon the strength of such prior judgment, it may, upon the presentation of such evidence, be dissolved.<sup>25</sup> And although the defense now relied upon was raised in the former proceeding, yet if it is now supported by evidence of such a conclusive nature as to lead to a different conclusion, interlocutory relief may properly be refused.<sup>26</sup> Moreover the rule requires that a prior adjudication, in order to afford sufficient ground for a preliminary injunction, should have been rendered in a proceeding where there was an actual, *bona fide* controversy between the parties in which a contest has been made against the validity of the patent. Where, therefore, the adjudication has been rendered in a cause which has been submitted on final hearing without brief or argument upon behalf of the defendant, it will not afford ground for a preliminary injunction where there is no

<sup>22</sup> Many *v.* Sier, 1 Fish., 31.

<sup>23</sup> Day *v.* Hartshorn, 3 Fish., 32.

<sup>24</sup> Bailey W. M. Co. *v.* Adams, 3 Banning & A., 96; Ladd *v.* Cameron, 25 Fed., 37; Glaenzer *v.* Wiederer, 33 Fed., 583; Norton D. C. & S. Co. *v.* Hall, 37 Fed., 691; Bow-

ers *v.* San Francisco Bridge Co., 69 Fed., 640; Western Electric Co. *v.* Keystone Tel. Co., 115 Fed., 809.

<sup>25</sup> Cary *v.* Domestic S.-B. Co., 26 Fed., 38.

<sup>26</sup> Lockwood *v.* Faber, 27 Fed., 63.

proof of public acquiescence and the validity of the patent is vigorously denied.<sup>27</sup> So also a final decree entered by consent upon a settlement of the litigation, will not fulfill the requirements of the rule and constitutes no ground for a preliminary injunction.<sup>28</sup> Nor will a former judgment suffice as a basis for interlocutory relief where it was rendered in a suit which, at the time of its rendition, had ceased to be an adversary proceeding, which fact was not known to the court at the time of its decree.<sup>29</sup> And notwithstanding a prior adjudication in favor of a patent, the court may refuse a preliminary injunction where it is shown that the right claimed by the plaintiff was not fairly in controversy in the former action or that certain material facts were not known or considered in that proceeding.<sup>30</sup> So the adjudication will not avail where it appears that the construction given to plaintiff's patent in the former suit was not broad enough to cover defendant's process and therefore to subject them to the charge of infringement.<sup>31</sup> Nor need the court follow such an adjudication as a matter of comity where it has already reached a different conclusion in ignorance of it.<sup>32</sup> And where the prior judgment

<sup>27</sup> *American Electric Novelty Co. v. Newgold*, 99 Fed., 567. And see *American M. P. Co. v. Vail*, 15 Blatch., 315. But see *Orr v. Littlefield*, 1 Woodb. & M., 13.

<sup>28</sup> *De Ver Warner v. Bassett*, 7 Fed., 468. In this case it appeared that in the action relied upon as a prior adjudication, a motion for a preliminary injunction had been argued and granted. Afterward defendant procured a re-hearing of this motion and the court, after re-examining the question, continued the injunction. Subsequently a settlement was had and the court entered a final decree by consent. From the language used,

the court would seem to refer to the action upon these interlocutory applications as the prior adjudication in question. But the decision was doubtless intended to apply also to the action in entering the final decree.

<sup>29</sup> *Western Electric Co. v. Anthracite Tel. Co.*, 100 Fed., 301; *S. C.*, on final hearing, 113 Fed., 834.

<sup>30</sup> *Page v. Holmes B. A. T. Co.*, 2 Fed., 330.

<sup>31</sup> *Whippany Mfg. Co. v. United I. F. Co.*, 30 C. C. A., 615, 87 Fed., 215.

<sup>32</sup> *Consolidated R.-M. Co. v. Smith M. P. Co.*, 40 Fed., 305.

upon which a preliminary injunction has been based is subsequently reversed upon appeal, the injunction should be dissolved; and this is so, although the reversal was because of an accord and satisfaction.<sup>33</sup> And where complainant relies upon a previous verdict of a jury and judgment of a court of law, for the establishing of his patent upon an application for an injunction, he must aver in his bill that such proceedings have taken place.<sup>34</sup> If the verdicts upon which complainant relies have been rendered upon claims so inconsistent and contradictory that the court can not say with certainty what is and what is not an infringement of the patent, the injunction will be refused.<sup>35</sup> And the fact that another court has, upon an interlocutory application, granted an injunction against other parties restraining the infringement of the patent is not, of itself, a sufficient adjudication of plaintiff's right to justify an injunction when the infringement is positively denied by answer and affidavits.<sup>36</sup> And where it is sought to avoid a preliminary injunction upon the ground of newly discovered evidence, although such evidence may not be of such a conclusive, positive and satisfactory character as to warrant the belief that, had it been presented in the former action, the result would have been different, it may nevertheless be sufficient to justify the court in dissolving a temporary injunction previously granted, upon the filing of a bond by the defendant.<sup>37</sup> And it is to be observed that no considerations of comity require a court to shut its eyes and blindly follow the prior adjudications of other courts, where it is convinced upon independent investigation that such decisions are clearly erroneous; and the action of the court in refusing thus to be

<sup>33</sup> *Prieth v. Campbell P. & M. Co.*, 25 C. C. A., 624, 80 Fed., 539. And see, *ante*, § 954.

<sup>34</sup> *Parker v. Brant*, 1 Fish., 58.

<sup>35</sup> *Parker v. Sears*, 1 Fish., 93.

<sup>36</sup> *Sargent Manufacturing Co. v. Woodruff*, 5 Biss., 444.

<sup>37</sup> *Norton v. Eagle Automatic Can Co.*, 61 Fed., 293.



bound is held to be the exercise of a proper discretion which will not be disturbed upon appeal.<sup>38</sup>

§ 959. **Effect of re-issue covering wider ground.** Where the validity of a patent has been sustained by a decision at law during its original term, and thereafter a re-issue is obtained covering a wider ground than that adjudicated in the original, all that lies between the limits of the original and of the re-issue is disputed territory. And if in such case the infringement which it is sought to enjoin lies wholly within that disputed territory, the application for relief will be denied.<sup>39</sup>

<sup>38</sup> *Welsbach Co. v. Cosmopolitan I. L. Co.*, 43 C. C. A., 418, 104 Fed., 83. It is admittedly a matter of considerable difficulty to reconcile this case satisfactorily with the otherwise unanimous decisions of the courts in which the effect of prior adjudications is so clearly and definitely established. And the wisdom of attempting,

upon an interlocutory application, to pass judgment upon the validity of a patent contrary to the solemn and deliberate adjudication of another court rendered after a strenuous contest and upon final hearing may well be questioned.

<sup>39</sup> *Poppenhusen v. Falke*, 2 Fish., 181.

## III. PRINCIPLES UPON WHICH RELIEF IS GRANTED.

- § 960. Defendant's *bona fides*; patent to defendant.
- 961. Injunction not granted on patent alone.
- 962. Considerations of hardship and convenience.
- 963. *Prima facie* infringement must be shown; recent patent.
- 964. Clear infringement required when patent not adjudicated; good faith of defendants.
- 965. Acquiescence and encouragement by plaintiff a bar to relief.
- 966. Limitations upon the doctrine.
- 967. Defendant's pecuniary responsibility; questions of damage; license fee as measure of damage; damages for past infringement will not justify future infringement.
- 968. Bond or security in lieu of injunction.
- 969. Plaintiff's prior possession and use considered; partial infringement; denial by answer.
- 970. Dissolution.
- 971. Rights of licensee.
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- 973. Actual infringement not necessary; apprehensions of future infringement; experiments.
- 974. Public convenience; injury to third persons.
- 975. Validity; novelty; infringement.
- 976. Infringement after verdict; promise by defendant not to continue infringement.
- 977. Subsequent patent to defendant; doubt as to novelty.
- 978. Proof as to inventor; dissolution.
- 979. Parties; action against United States.
- 980. Questions of jurisdiction.
- 981. Expiration of patent; assignee of defendant *pendente lite*.
- 981a. The same; effect on appeal; when injunction allowed though patent has expired.
- 981b. Effect of expiration on right to accounting.
- 982. Grounds of dissolution; account; appeal.
- 983. Penalty for not marking patented articles; injunction upon the hearing.
- 984. Process not patented may be protected.
- 985. When jurisdiction exercised over foreigners.
- 986. Violation; infringement not determined in contempt proceeding; judgment imposing fine, being criminal, is reviewable by writ of error.
- 987. Account not incidental to injunction.

§ 960. Defendant's *bona fides*; patent to defendant.  
Where defendant is acting in good faith under letters

patent covering his process of manufacture, he has a *prima facie* right to continue, and the court will not, upon *ex parte* affidavits, on an application for a preliminary injunction, decide the whole merits of a *bona fide* issue, and thus anticipate a final judgment upon the legal questions involved. And if in such case defendant shows a belief that he has a just defense, and has not wilfully pirated complainant's invention, the court will require a case of evident mistake of law, or of fact, or both, in the defense thus interposed, before it will resort to the remedy by injunction.<sup>1</sup> But the fact that defendant, after the alleged infringement, has received a patent for the article manufactured by him, will not prevent an injunction if the infringement is satisfactorily established, since the granting of a subsequent patent merely serves to indicate the opinion of the officers granting it, upon an *ex parte* examination of the subject, and is by no means conclusive.<sup>2</sup> Especially if complainant has already established his title at law, and obtained an injunction in the same court, the relief will be allowed, although defendant claims to have patented his apparatus in good faith.<sup>3</sup> And where complainant makes out a strong *prima facie* case for an injunction, it will not be refused because defendant alleges that he is the first and original inventor, his evidence resting upon an *ex parte* application to the patent office and upon his own affidavit, he having slept upon his rights for a long period of years.<sup>4</sup>

§ 961. **Injunction not granted on patent alone.** Equity will never interfere upon the mere patent alone, without proof of user or sales, or of recoveries at law,<sup>5</sup> and where complainant has failed in previous trials at law to

<sup>1</sup> *Goodyear v. Dunbar*, 1 Fish., 472.

<sup>2</sup> *Morse Pen. Co. v. Esterbrook*, 3 Fish., 515.

<sup>3</sup> *Sickels v. Tileston*, 4 Blatch., 109.

<sup>4</sup> *Potter v. Stevens*, 2 Fish., 163.

<sup>5</sup> *Hovey v. Stevens*, 1 Woodb. & M., 290; *Toppan v. National Co.*, 4 Blatch., 509; S. C., 2 Fish., 196.

establish his rights, and it does not appear that they have been acquiesced in by the public, the relief will be withheld.<sup>6</sup> And where complainant's patent has but a short time yet to run, and there can be but little difficulty in determining what would be a proper indemnity for the use of his invention in the manufacture of defendant's machines, defendant's apparatus embracing improvements which can not be used without the original invention of complainant, upon which they are engrafted, the defendant may be permitted, in lieu of a temporary injunction, to give bond with approved security to account and pay such sum as the court may finally decree.<sup>7</sup>

§ 962. **Considerations of hardship and convenience.** While considerations of the relative hardship and inconvenience to the respective parties, by granting or withholding the relief, may properly be taken into account in determining the application, yet where the right is well established and the violation clear, neither considerations of public or private convenience, or of hardship to the defendant, will prevent the court from interfering.<sup>8</sup> More especially where complainant's right has been established by previous adjudication will the court refuse to be governed by considerations of hardship to defendant from granting the injunction, since it is manifestly unjust that a patentee, whose rights have already been established, should be under the necessity of meeting litigation in a great variety of cases, thereby rendering his patent comparatively valueless.<sup>9</sup> And when there has been long and quiet enjoyment under the patent, and its validity has been sus-

<sup>6</sup> *Serrell v. Collins*, 4 Blatch., 61; *Toppan v. National Co.*, *ib.*, 509. And see *North v. Kershaw*, *ib.*, 70; *Muscan H. M. Co. v. American H. M. Co.*, *ib.*, 174.

<sup>7</sup> *Howe v. Morton*, 1 Fish., 586.

<sup>8</sup> *Sickels v. Tileston*, 4 Blatch., 109; *Potter v. Fuller*, 2 Fish., 251; *Ely v. Monson & B. M. Co.*, 4 Fish., 64.

<sup>9</sup> *Ely v. Monson & B. M. Co.*, 4 Fish., 64.

tained by the courts, an injunction will not be withheld upon the doctrine of comparative inconvenience.<sup>10</sup> And where the plaintiff's right and the infringement by the defendant are clear, it is no defense to the ultimate granting of the relief that the writ may result in great injury or inconvenience to the public at large, although the court may, in such case, suspend the operation of the injunction for a reasonable time if by so doing such inconvenience or injury may thereby be lessened or avoided.<sup>11</sup>

§ 963. **Prima facie infringement must be shown; recent patent.** While it is essential that the patentee should produce *prima facie* evidence of his title, yet this alone will not suffice to entitle him to the injunction, since, however clearly the validity of the patent may be established, a *prima facie* case of infringement must be made out before equity will interpose.<sup>12</sup> But if the case be free from doubt in other respects, the relief will not be refused because the patent is a recent one.<sup>13</sup>

§ 964. **Clear infringement required when patent not adjudicated; good faith of defendants.** When it is sought to restrain an alleged infringement of a patent whose validity has never been sustained by any prior adjudication, acquiescence in its use being relied upon as the foundation for relief, the infringement must be palpable and clear. And while the fact that defendants are using a machine which is openly made, sold and used under patents, and which the manufacturers have put upon the market in good faith and in open competition with the machines made by plaintiff and in the belief that they were not trespassing upon his rights, will not of itself constitute a sufficient defense if defendants are

<sup>10</sup> Davenport v. Jepson, 4 De- son-Houston Electric Co. v. Union  
Gex, F. & J., 440. Ry. Co., 78 Fed., 365.

<sup>11</sup> Campbell P. & M. Co. v. Man- <sup>12</sup> Hill v. Thompson, 3 Meriv.,  
hattan Ry. Co., 49 Fed., 930; Thom- 626.

<sup>13</sup> Clark v. Ferguson, 1 Gif., 184.



adjudged guilty of an infringement upon the final hearing, it constitutes a reason why the court should hesitate to interfere before final decree, when there is no suggestion of irremediable injury in the meantime, or of any want of ability to respond in the event of a final recovery.<sup>14</sup>

§ 965. **Acquiescence and encouragement by plaintiff a bar to relief.** In considering applications for relief by injunction against the infringement of patents, courts of equity require of the patentee due and reasonable diligence in the assertion of his rights, and a long or unreasonable delay in invoking relief; or acquiescence for a considerable length of time in the infringement complained of, may afford sufficient ground for refusing an injunction.<sup>15</sup> Thus, where the patentee has stood by for many years and acquiesced in the use of the article which he afterward seeks to enjoin, such acquiescence, without objection and without demand of compensation, is regarded as conclusive evidence that the continuance of the use of his invention, for the short period yet remaining before the expiration of his patent, will not constitute such an irreparable injury as to warrant an injunction.<sup>16</sup> And where the patentee, while licensing certain persons to use his invention, has permitted others to use it without license and without objection, such conduct may be taken into consideration by the court, and although it is satisfied of the validity of the patent it will not interfere by an absolute and unconditional injunction, but will grant a temporary writ, with leave to defendant to come in and

<sup>14</sup> *Burleigh Rock Drill Co. v. Goodyear v. Honsinger*, 3 Fish., 147; *S. C.*, 2 Biss., 1; *Baxter v. Lobdell*, 1 Holmes, 450.

<sup>15</sup> *Lane & Bodley Co. v. Locke*, 150 U. S., 193, 14 Sup. Ct. Rep., 78; *Keyes v. Eureka Mining Co.*, 158 U. S., 150, 15 Sup. Ct. Rep., 772; *Woodmanse & H. Mfg. Co. v. Williams*, 15 C. C. A., 520, 68 Fed., 489; *Parker v. Sears*, 1 Fish., 93; *Combe*, 1 Ir. Ch., 284; *Blanchard v. Sprague*, 1 Cliff., 288; *Hockholzer v. Eager*, 2 Sawy., 361; *Covert v. Travers Bros. Co.*, 96 Fed., 568; *Meyrowitz Mfg. Co. v. Eccleston*, 98 Fed., 437.

<sup>16</sup> *Parker v. Sears*, 1 Fish., 93.

have the same dissolved upon giving security to complainant.<sup>17</sup> So it is held that acquiescence by a patentee for a considerable length of time in the use of his patented machine by defendant, who had previously constructed and used the same by permission of the patentee, will justify the court in refusing to interfere.<sup>18</sup> And where plaintiffs had permitted defendants to use the patented machine for a period of more than eighteen months, with full knowledge by plaintiffs of such user, such delay was held to constitute sufficient ground for refusing an injunction.<sup>19</sup> So if complainant has encouraged or acquiesced in the infringement, or has permitted the erection of works and large expenditures of money in the manufacture of the patented invention, he will not be protected.<sup>20</sup> And where defendant has manufactured under authority of a patent and with full knowledge of complainants for a considerable length of time, without molestation, and has invested money in the business, to warrant an injunction the case must be free from all reasonable doubt.<sup>21</sup> And especially will plaintiff's laches be a bar to relief upon an application for a preliminary injunction.<sup>22</sup> Nor will a preliminary injunction be allowed where plaintiff has suffered a period of several months to elapse between the filing of the bill and the application for the injunction, during which time the defendant has laid in a large supply of the alleged infringing article for the year's business which is of short duration.<sup>23</sup>

<sup>17</sup> *Goodyear v. Honsinger*, 3 Sykes v. Manhattan, 6 Blatch., 496. Fish., 147; S. C., 2 Biss., 1.      <sup>21</sup> *North v. Kershaw*, 4 Blatch.,

<sup>18</sup> *Blanchard v. Sprague*, 1 Cliff., 70.

288.

<sup>19</sup> *Hockholzer v. Eager*, 2 Sawy., 361.

<sup>20</sup> *Bacon v. Jones*, 4 Myl. & Cr., 436; *Bridson v. Benecke*, 12 Beav., 7; *Bovill v. Crate*, L. R. 1 Eq., 388;

*North v. Kershaw*, 4 Blatch., 70;

<sup>22</sup> *Keyes v. Pueblo S. & R. Co.*, 31 Fed., 560; *Waite v. Chichester Chair Co.*, 45 Fed., 258; *Price v. Joliet Steel Co.*, 46 Fed., 107; *Blakey v. Kurtz*, 78 Fed., 368.

<sup>23</sup> *Ney Mfg. Co. v. Superior Drill Co.*, 56 Fed., 152.

§ 966. **Limitations upon the doctrine.** Notwithstanding the well settled doctrine denying relief by injunction when the patentee has long delayed the assertion of his rights, the fact that plaintiffs have been compelled to litigate their rights under their patent by a long series of suits, and have but recently obtained an adjudication in their favor, has been held a sufficient excuse for their apparent laches in seeking preventive relief in equity.<sup>24</sup> And a delay of three months in filing the bill after plaintiff is apprised of the character of defendant's infringement affords no ground for refusing an interlocutory injunction, when defendant has not thereby been induced to change his position, and when he has had no communication with plaintiff in the interval.<sup>25</sup> And it is held that laches in the sense of mere delay in bringing suit will not deprive a patentee of the right to a perpetual injunction against infringement in the absence of such words, acts or conduct as are sufficient to create an estoppel.<sup>26</sup> Where there has not been a long or uninterrupted possession under the patent, and there has been a delay of two years upon plaintiff's part in seeking to restrain the alleged infringement, it is proper to refuse the injunction *in limine*, but without prejudice and with liberty to plaintiff to bring his action at law.<sup>27</sup> But when, in such case, plaintiff proceeds with his action at law and obtains a verdict therein, it is then proper to grant an injunction, even though a bill of exceptions has been tendered in the action at law which has not yet been finally disposed of on error to a court of review.<sup>28</sup>

§ 967. **Defendant's pecuniary responsibility; questions of damage; license fee as measure of damage; damages for past**

<sup>24</sup> Rumford Works v. Vice, 14 Blatch., 179.

<sup>25</sup> Union Co. v. Binney, 5 Fish., 166.

<sup>26</sup> Sawyer Spindle Co. v. Taylor, 69 Fed., 837. And see, *ante*, § 10 a.

<sup>27</sup> Baxter v. Combe, 1 Ir. Ch., 284.

<sup>28</sup> Baxter v. Combe, 3 Ir. Ch., 256, affirming S. C., Ib., 245.

**infringement will not justify future infringement.** Defendant's pecuniary responsibility is a material circumstance to be taken into account on the application for an injunction, as is also the fact that he does not make or vend the patented machine, but merely uses it, the only injury resulting therefrom to the patentee being the loss of his royalty, and not a damaging and constantly increasing competition.<sup>29</sup> Where, therefore, the plaintiff is not the manufacturer or vendor of the infringing article, but merely licenses his patent for a fixed license fee, so that the damages are readily and satisfactorily ascertained, and it further appears that the defendant is abundantly able to respond in damages, relief by injunction will be refused and the plaintiff will be left to the pursuit of his legal remedy.<sup>30</sup> So where the injury to the patentee resulting from the infringement consists, not in the use of the invention, but in depriving him of compensation for such use, the price or value of a license constituting the rule of damages, an injunction is not the proper remedy to enforce payment of the money, since the measure of damages being a certain and fixed sum, ample redress may be had at law.<sup>31</sup> But where the validity of a patent and the infringement thereof are clear, the payment of damages for past infringement will not confer upon defendant the right to infringe in the future and will accordingly be no defense to the granting of the writ against future infringement.<sup>32</sup>

§ 968. **Bond or security in lieu of injunction.** Although defendant's machine may be an infringement of that of complainant, yet if it contain other and valuable improve-

<sup>29</sup> *Morris v. Lowell*, 3 Fish., 37.

<sup>31</sup> *Sanders v. Logan*, 2 Fish., 167.

<sup>30</sup> *Smith v. Sands*, 24 Fed., 470; *National H.-P. M. Co. v. Hedden*, 29 Fed., 147; *Kane v. Huggins Cracker Co.*, 44 Fed., 287; *Overweight C. E. Co. v. Cahill E. Co.*, 86 Fed., 338.

And see *Livingston v. Jones*, *Ib.*, 207.

<sup>32</sup> *Campbell P. & M. Co. v. Manhattan Ry. Co.*, 49 Fed., 930.

ments not covered by complainant's patent, and if the issuing of the writ would be likely to prejudice the actual rights of defendant, without being as beneficial to complainant as an account of profits with security for their payment, the injunction will be withheld on condition of defendant's accounting and giving security for payment.<sup>33</sup> And the practice is sometimes adopted of granting the injunction in the alternative, unless defendant will give bond in a sum fixed by the court to respond in such damages, if any, as may be awarded upon the final decree.<sup>34</sup> So where plaintiff is not a manufacturer of the patented article and will be adequately protected by a just compensation for the use of his invention, and defendants are heavy manufacturers with a large capital invested in their business, the sudden stoppage of which would be disastrous to them and would be of no benefit to plaintiff, it is proper to allow defendants the opportunity of giving a bond to secure plaintiffs, in lieu of granting an injunction.<sup>35</sup> And where the validity of complainant's patent is denied on the ground of a prior public use, the patent itself never having been adjudicated, and the general allegation in the bill of acquiescence on the part of the public is unsupported by proof and denied by the answer, defendant will not be enjoined from constructing a single machine merely for his own use, if he gives security to complainant for all loss and damage which may result to him by reason of the construction and use of the machine.<sup>36</sup> But where the infringement

<sup>33</sup> *Stainthorp v. Humiston*, 2 Fish., 302; *S. C.*, 1 Holmes, 96; Fish., 311. And see *Howe v. Morton*, 1 Fish., 586. As to the considerations governing the court in determining whether to grant an injunction or to require defendant to keep an account, see *Plimpton v. Spiller*, 4 Ch. D., 286.

<sup>35</sup> *Dorsey Co. v. Marsh*, 6 Fish., 387. And see *Yuengling v. Johnson*, 1 Hughes, 607.

<sup>36</sup> *Morris Shelbourne*, 4 Fish., 377; *S. C.*, 8 Blatch., 266.



is manifest and the right to an injunction clear, it will not be withheld because of defendant offering security for damages and an account of sales.<sup>37</sup>

§ 969. **Plaintiff's prior possession and use considered; partial infringement; denial by answer.** On an application to enjoin the infringement of a patent, the court may take into consideration complainant's possession of the right and his use of the invention before the application for the grant of letters patent.<sup>38</sup> But the use must be a public use, under an avowed claim of right, since, if this be not so, there is no exclusive possession as against the public, and no claim in which it can acquiesce.<sup>39</sup> It is not, however, necessary that all the grants of right in the patent should have been infringed, but the injunction will issue for the violation of a portion of them.<sup>40</sup> And a mere denial by answer of the equity of the bill does not prevent the court from looking into the law and the facts of the case, and where the right depends upon the interpretation to be given to the letters patent the court will look into the instrument and construe it, notwithstanding the answer denies the right to the relief.<sup>41</sup>

§ 970. **Dissolution.** An injunction in patent cases is not designed to delay or impair the right of trial by jury, but rather to make the *prima facie* title prevail until such trial can be had.<sup>42</sup> Hence, where an injunction has been granted on proof of former recoveries and long possession, it will not necessarily be dissolved on an answer denying the validity of the patent, but will be continued to allow an issue at law upon that question.<sup>43</sup> Nor will the injunction be dis-

<sup>37</sup> Tracy v. Torrey, 2 Blatch., 275.

<sup>41</sup> Clum v. Brewer, 2 Curt. C. C.,

<sup>38</sup> Sargent v. Seagrave, 2 Curt. C. 506.

C., 553.

<sup>42</sup> Woodworth v. Rogers, 3

<sup>39</sup> Toppan v. National Co., 4 Woodb. & M., 135.  
Blatch., 509.

<sup>43</sup> Orr v. Merrill, 1 Woodb. & M.,

<sup>40</sup> Potter v. Holland, 4 Blatch., 376.  
238; S. C., 1 Fish., 382.

solved because of doubts as to the validity of the patent, growing out of errors on the part of the officers issuing it, when steps have been taken in Congress to correct such errors by appropriate legislation.<sup>44</sup>

§ 971. **Rights of licensee.** A licensee of a patent, if his rights be infringed, is entitled to the aid of an injunction to restrain such infringement to the same extent as the original patentee.<sup>45</sup> Thus, a licensee who has the exclusive right to vend the patented article within a given territory may enjoin others from purchasing or procuring the devise from the licensor and selling it within the forbidden territory in violation of the contract between the licensor and the plaintiff.<sup>46</sup> And where a patentee has by contract given a license to plaintiff to make and use the patented invention, the suing out of an injunction restraining plaintiff from such manufacture is a breach of the contract and sufficient ground for maintaining an action thereon.<sup>47</sup> But where plaintiff held a license to manufacture under defendant's patent, defendants having the option to terminate plaintiff's license if the sums due for fees were not paid, it was held that a court of equity had no jurisdiction to entertain a bill to obtain a construction of the license and to restrain defendants from giving notice of their option to terminate the license and from attempting to collect the fees, but that the remedy should be sought at law.<sup>48</sup>

§ 972. **The same.** Where an injunction is in full force against the use of a patented machine, the court will not allow its use by parties claiming under the patentee of the

<sup>44</sup> *Woodworth v. Hall*, 1 Woodb. & M., 389.

<sup>45</sup> *Brammer v. Jones*, 2 Bond, 100.

<sup>46</sup> *New England Phonograph Co. v. Edison*, 110 Fed., 26; *New York*

*Phonograph Co. v. Jones*, 123 Fed., 197.

<sup>47</sup> *Sullings v. Goodyear Dental Vulcanite Co.*, 36 Mich., 313.

<sup>48</sup> *Florence S. M. Co. v. Singer M. Co.*, 8 Blatch., 113.

invention enjoined.<sup>49</sup> But, although a provisional injunction will be granted against the licensee of a patent, if applied for during his violation of the restrictions subject to which he received his license, yet if it appears that such violation was made under a misapprehension of his rights, and has been discontinued, the injunction will be withheld.<sup>50</sup> And where defendant claims the right to manufacture under an assignment of a license from plaintiffs, an interlocutory injunction will be refused when it is not shown that defendants are using the invention in any manner not warranted by the license.<sup>51</sup> Where, by the terms of the license, a forfeiture is incurred by non-payment, the remedy may be either at law to enforce the payment, or in equity to restrain the use of the patent.<sup>52</sup> But a license to use the patent, granted by one tenant in common, can not be enjoined by another tenant in common, their right to sell or license being equal.<sup>53</sup> And where it appears by the answer that defendant was acting under a license from complainant, the injunction will be dissolved.<sup>54</sup>

§ 973. **Actual infringement not necessary; apprehensions of future infringement; experiments.** It is not necessary to the issuing of the writ that the wrong should actually have been committed, but reasonable grounds for belief that an infringement may occur in the future will warrant the injunction, when the title has been established at law.<sup>55</sup> So

<sup>49</sup> Woodworth *v.* Edwards, 3 Woodb. & M., 120.

<sup>50</sup> Wilson *v.* Sherman, 1 Blatch., 536.

<sup>51</sup> Belding *v.* Turner, 8 Blatch., 321.

<sup>52</sup> Woodworth *v.* Weed, 1 Blatch., 165. It may well be doubted, however, whether this rule can be maintained consistently with the established principle that equity

will never interfere where there is adequate remedy at law.

<sup>53</sup> Clum *v.* Brewer, 2 Curt. C. C., 506.

<sup>54</sup> Goodyear *v.* Bourn, 3 Blatch., 266.

<sup>55</sup> Poppenhusen *v.* New York, 4 Blatch., 184. This was a bill for an injunction where a verdict had been had against the defendants in the same court in an action at law

although no actual infringement has occurred, yet if there is a deliberate intention expressed and about to be carried into execution to infringe under a claim of right to use the patented invention, plaintiff is entitled to relief by injunction.<sup>56</sup> And where defendant has in his possession a number of the infringing devices and has already infringed plaintiff's patent, or where it is clear that he intends to manufacture and sell the offending device, it is no defense that no sales have as yet been made or that the defendant has no further intention of violating the plaintiff's rights, since, if

upon the same patents. The bill alleged violation of complainant's right after the verdict, and that defendants would continue such violation in future, unless restrained by injunction. Ingersoll, J., delivering the opinion of the court, says: "The writ of injunction is a remedial writ in the nature of a prohibition. The object of the present motion for an injunction is to prevent the commission of injuries in the future, not to redress injuries that are past. The writ prayed for is to act as a remedy against a threatened wrong by preventing the commission of such wrong; and it is not necessary, before a writ to prevent a wrong can issue, that the wrong should actually have been committed. If it were, the remedy by injunction would be a very inadequate one. If the rights of a party under a patent have been fully and clearly established, and an infringement of such rights is threatened, or if, when they have been infringed, the party has good reason to believe they will continue to be infringed, an injunc-

tion will issue. It issues for the reason that there is good ground to believe that in future they will be infringed. Where a trial at law has been had, resulting in a verdict in favor of the patentee, and the right to the improvement patented has been fully established, to the satisfaction of the court, and the infringement of right made clear, such a trial resulting in such a verdict is sufficient, without any other proof, to authorize the court to grant an injunction to prevent any future violation of right. Such a trial, with such a result, affords sufficient proof, that, in future, there will be an infringement, unless such infringement is restrained by injunction. It is, under such circumstances, almost a matter of course that the injunction should be allowed. (*Neillson v. Harford*, Webster's Patent Cases, 373). Such a trial at law, resulting in such a verdict, to the entire satisfaction of the court, has taken place between the parties to this suit." See also *Frearson v. Loe*, 9 Ch. D., 48.

<sup>56</sup> *Frearson v. Loe*, 9 Ch. D., 48.

such is the case, no harm will result from the injunction.<sup>57</sup> And the fact that defendant has previously infringed plaintiff's patent and has some of the infringing devices upon hand and has advertised them in his catalogue is sufficient ground for an injunction, even though defendant is at present making no sales and has promised not to do so.<sup>58</sup> And where defendant has already filled an order for the infringing device in the ordinary course of business and there is therefore reason to believe he will fill similar orders in the future if brought to him, an injunction will issue to restrain future infringement, although there is no threat or suggestion upon the part of the defendant of future infringement.<sup>59</sup> And while the making of the patented article by defendant in the course of *bona fide* experiments, with a view of improving upon the invention, is not of itself an infringement, yet equity will enjoin a defendant from manufacturing a quantity of the patented goods under the plea of experimenting, even though the quantity be small.<sup>60</sup> But where the owners of rival machines have submitted them to a competitive examination before judges appointed by an institute for the promotion of manufactures and the arts, and such judges have determined that one of the machines is entitled to a medal of superiority, an injunction will not lie in behalf of one of the competitors to prevent the delivery of such medal.<sup>61</sup>

§ 974. **Public convenience; injury to third persons.** When the patented machine, the use of which it is sought to enjoin, is being used by defendants for the convenience of the public, as in the case of a stone-crusher used in repairing the roads

<sup>57</sup> *Sessions v. Gould*, 49 Fed., 855; *New York B. & P. Co. v. Gutta Percha Mfg. Co.*, 56 Fed., 264. And see, *post*, § 976.

<sup>58</sup> *Henzel v. California Electrical Works*, 2 C. C. A., 495, 51 Fed., 754.

<sup>59</sup> *Dunlop Pneumatic Tyre Co. v. Neal*, (1899) 1 Ch., 807.

<sup>60</sup> *Frearson v. Loe*, 9 Ch. D., 48.

<sup>61</sup> *New E. V. Co. v. American Institute*, 24 Fed., 561; S. C., upon final hearing, 28 Fed., 722.



in a large cemetery adjacent to a city, the use of the machine being necessary for the public convenience in burying the dead, an injunction may be withheld *in limine* upon terms of defendant paying into court the amount of plaintiff's royalty upon the machine, to abide the result of the suit.<sup>62</sup> But, while the question of public convenience may thus be considered in passing upon an application for an interlocutory injunction to restrain the infringement of a patent, it is held that the fact that the granting of the injunction will indirectly work an injury to third persons affords no ground for denying the relief in a case otherwise proper for an injunction.<sup>63</sup> Where, however, plaintiffs have no patented machine in operation and are neither manufacturing nor using it, and the effect of an injunction would be to close up defendant's business and it would be productive of great expense and injury to third parties, it is proper for the court to take such facts into consideration in refusing an application for an interlocutory injunction.<sup>64</sup>

§ 975. **Validity; novelty; infringement.** To warrant relief by injunction against the infringement of letters patent, the court must be satisfied of the validity of plaintiff's patent, of the novelty of his invention and of the fact of infringement.<sup>65</sup> If, therefore, grave doubt exists as to the validity of the patent, an interlocutory injunction will be denied.<sup>66</sup> So if the court, upon the evidence before it, entertains strong doubts as to the novelty of plaintiff's invention, it will refuse to interfere by injunction *in limine*.<sup>67</sup> And where defend-

<sup>62</sup> Blake v. Greenwood Cemetery, 14 Blatch., 342.

<sup>63</sup> Rumford Works v. Vice, 14 Blatch., 179.

<sup>64</sup> Hockholzer v. Eager, 2 Sawy., 361. And see Dorsey Co. v. Marsh, 6 Fish., 387.

<sup>65</sup> Fales v. Wentworth, 1 Holmes, 96; S. C., 5 Fish., 302; Jones v.

Hodges, 1 Holmes, 37; Sargent Manufacturing Co. v. Woodruff, 5 Biss., 444.

<sup>66</sup> Fales v. Wentworth, 1 Holmes, 96; S. C., 5 Fish., 302; Huber v. Myers Sanitary Depot, 33 Fed., 48; Wollensak v. Sargent, 33 Fed., 840.

<sup>67</sup> Jones v. Hodges, 1 Holmes, 37.

ant's article which is alleged to be an infringement of plaintiff's patent is being manufactured under letters patent, the court, upon an application for an interlocutory injunction, is at liberty to indulge the presumption that it is not an infringement, and may deny the injunction, leaving the question of infringement to be determined upon the final hearing.<sup>68</sup> So when the fact of infringement is fully denied by the answer under oath, and by affidavits in support of it, the question being left in great doubt upon the papers presented upon the motion for an injunction, it is proper to withhold the relief upon an interlocutory application, leaving the matter to be determined upon the hearing.<sup>69</sup>

§ 976. **Infringement after verdict; promise by defendant not to continue infringement.** When a verdict has already been recovered against defendants in an action at law in the same court and upon the same patents, and a bill is then filed to procure an injunction, the bill alleging a violation of plaintiff's rights after verdict, it will not suffice for defendants to answer that what they have done since the finding of the verdict was not in violation of plaintiff's right; but they should state explicitly that they do not intend to commit any infringement in the future.<sup>70</sup> Nor will the fact that since the commencement of suit defendants have ceased to infringe, and do not threaten further infringement, prevent the issuing of a preliminary injunction, if a necessity for the writ existed at the time of filing the bill, plaintiffs alleging that they apprehend a continuance of the infringement. In such cases the patentee will not be compelled to rest his equities upon the mere assertion of defendants that the infringement shall not be repeated, and the court will impose the necessary restraint to prevent a

<sup>68</sup> *Sargent Manufacturing Co. v. Backus H. Co.*, 97 Wis., 160, 72 N. Woodruff, 5 Biss., 444.

<sup>69</sup> *Sargent Manufacturing Co. v.*      <sup>70</sup> *Poppenhusen v. New York*, 4 Woodruff, 5 Biss., 444; *Walker v. Blatch*, 184.

repetition of the injury.<sup>71</sup> And where defendant has been guilty of infringing plaintiff's patent in the past, his assurance that he has no further intention of so doing and his promise to desist will not be sufficient to overcome the presumption of future infringement arising from his past acts and will accordingly be no defense to an application for an injunction.<sup>72</sup> But where, in addition to a disclaimer by the defendant of an intention of again infringing plaintiff's patent, there is an absence of reasonable ground for believing that he will again do the act complained of, the injunction will be denied.<sup>73</sup>

§ 977. **Subsequent patent to defendant; doubt as to novelty.** Complainant's patent being fully established at law, and the infringement being clearly proven, the injunction will not be refused because of defendant's reliance upon a subsequent patent to himself, which contains on its face satisfactory evidence that its process involves an infringement of the prior patent.<sup>74</sup> But to warrant the injunction, it must appear that defendant has either used the patented machine himself, or has employed others to use it for him, or has profited by its use.<sup>75</sup> And where the novelty of the invention is denied, and the question is involved in considerable doubt, the injunction will be withheld until a trial at law.<sup>76</sup>

§ 978. **Proof as to inventor; dissolution.** Upon the application for the writ it must appear, either in the sworn bill,

<sup>71</sup> *Potter v. Crowell*, 1 Abb. U. S. Gutta Percha Mfg. Co., 56 Fed., R., 89; S. C., 3 Fish., 112; *Jen-* 264.

*kings v. Greenwald*, 2 Fish., 37; <sup>73</sup> *Proctor v. Bayley*, 42 Ch. D., 390.

*Rumford Works v. Vice*, 14 Blatch., <sup>74</sup> *Goodyear v. Evans*, 6 Blatch., 179; *White v. Heath*, 10 Fed., 291. 121.

<sup>72</sup> *Geary v. Norton*, 1 DeG. & Sm., 9; *Celluloid Mfg. Co. v. Ar-* <sup>75</sup> *Woodworth v. Hall*, 1 Woodb. & M., 249.

*lington Mfg. Co.*, 34 Fed., 324; *White v. Walbridge*, 46 Fed., 526; <sup>76</sup> *Booth v. Garely*, 1 Blatch., *Sawyer Spindle Co. v. Turner*, 55 247.

Fed., 979; *New York B. & P. Co. v.*

or by affidavit, that complainant is the inventor of the patent to be protected, and it does not suffice that he swore to this when he obtained his patent.<sup>77</sup> And on a motion for a dissolution of the injunction, upon affidavits, sufficient proof must be adduced to overcome the equity of the bill and the evidence supporting it.<sup>78</sup> And where a special injunction is granted upon bill filed, a motion to dissolve will not be heard upon the same evidence, or on new evidence improperly neglected on the former hearing, but new and material testimony will be required.<sup>79</sup>

§ 979. **Parties.** Equity will not, on the application of the legal owner, enjoin the equitable owner of a patent.<sup>80</sup> But where one person has the legal and another the equitable right to the patent, both should be joined in an action for infringement.<sup>81</sup> And where the infringement is the act of several persons jointly, they should all be made defendants, but if it is their separate act separate bills should be filed against them.<sup>82</sup> The directors of a corporate company who, as the agents of the company, have committed an infringement, should be made parties.<sup>83</sup> And the assignor of a patent, who still retains an interest in the patent, although none in the territory where the infringement occurred, is a proper party to a bill for an injunction.<sup>84</sup> So the assignee of part of a patent, within a particular territory, may properly enjoin the infringement in that territory.<sup>85</sup> And where one of three parties works a patented machine, which

<sup>77</sup> *Sullivan v. Redfield*, 1 Paine, 33; *Goodyear v. New Jersey R. R.*, 441. 1 Fish., 626.

<sup>78</sup> *Sparkman v. Higgins*, 1 82 *Dilly v. Doig*, 2 Ves. Jr., 486.  
Blatch., 205. 83 *Betts v. DeVitre*, 34 L. J. Ch.,

<sup>79</sup> *Woodworth v. Rogers*, 3 289; *Goodyear v. Phelps*, 3 Blatch., 91.  
*Woodb. & M.*, 135.

<sup>80</sup> *Clum v. Brewer*, 2 Curtis, 506.

<sup>81</sup> *Stimpson v. Rogers*, 4 Blatch., 712. 84 *Woodworth v. Wilson*, 4 How.,

333; *Goodyear v. Allyn*, 6 Blatch., 584. 85 *Ogle v. Edge*, 4 Wash. C. C.,

is owned by two others, the relief will be granted against all.<sup>86</sup> Nor will the court refuse to enjoin because a number of parties, all of whom are interested in the patent, have contributed to a common fund for the protection of their common rights by prosecuting infringements of those rights.<sup>87</sup> But the owner of a patent can not maintain a bill to enjoin officers of the government of the United States from using devices alleged to infringe plaintiff's patent, where such devices are the property of the United States as owner or lessee and are being used by such officers in the service of the government. In such case the United States, having a proprietary interest in the alleged infringing device, is a necessary party to the proceeding and since it can not be made a party thereto, the bill must fail and the injunction be denied.<sup>88</sup>

§ 980. **Questions of jurisdiction.** For the purpose of restraining the infringement of a patent the court need only have jurisdiction of the person.<sup>89</sup> But where defendant resides in another jurisdiction, in which the infringement occurred, the court will not interfere.<sup>90</sup> And it has been held that a defendant who is the owner of a patent in certain territory can not be enjoined from selling the patented machine in complainant's territory, on the ground that the law extends protection only to the thing patented, and not to its product.<sup>91</sup> But it is no defense to an application for an injunction that the defendants have ceased manufacturing the infringing article in the district if they are still associated in the business of manufacturing and selling it at some place outside of the district.<sup>92</sup>

<sup>86</sup> *Woodworth v. Edwards*, 3 Woodb. & M., 120.

<sup>87</sup> *Potter v. Fuller*, 2 Fish., 251.

<sup>88</sup> *Belknap v. Schild*, 161 U. S., 10, 16 Sup. Ct. Rep., 443; *International Postal S. Co. v. Bruce*, 194 U. S., 601, 24 Sup. Ct. Rep., 820.

<sup>89</sup> *Wilson v. Sherman*, 1 Blatch., 536.

<sup>90</sup> *Goodyear v. Bourn*, 3 Blatch., 266.

<sup>91</sup> *Boyd v. Brown*, 3 McLean, 295.

<sup>92</sup> *Braddock Glass Co. v. Macbeth*, 12 C. C. A., 70, 64 Fed., 118.



§ 981. **Expiration of patent; assignee of defendant pendente lite.** An injunction may be granted, although the patent is about to expire, to restrain the sale of machines manufactured in violation thereof while it is yet in force.<sup>93</sup> And where the validity of the patent and the infringement by the defendant are clear, a preliminary injunction should be allowed, although the patent will soon expire and the defendant is financially responsible and willing to give bond for damages.<sup>94</sup> And under such circumstances, an injunction may be allowed upon final hearing.<sup>95</sup> But where, notwithstanding the validity of the patent and infringement by the defendant, the remaining life of the patent is of so short a duration that the effect of the relief would be merely nominal and of no practical value to the plaintiff, an interlocutory injunction may be denied upon defendant's giving bond for the payment of damages.<sup>1</sup>

§ 981 *a*. **The same; effect on appeal; when injunction allowed though patent has expired.** In case the patent has already expired, either before the filing of the bill or thereafter but before the application for the injunction, that fact is conclusive against the right to the writ, either upon interlocutory application or upon final hearing.<sup>2</sup> And in such case, if a preliminary injunction has already been granted, it should be dissolved even as to the sale of articles manufactured during the life of the patent.<sup>3</sup> And where an ap-

<sup>93</sup> *Crossley v. Beverley*, 1 Russ. & M., 166, note.

<sup>94</sup> *Electric S. B. Co. v. Buffalo E. C. Co.*, 117 Fed., 314.

<sup>95</sup> *American Bell Tel. Co. v. Brown*, 58 Fed., 409; *American Bell Tel. Co. v. Western Tel. & Const. Co.*, 58 Fed., 410.

<sup>1</sup> *National Cash-Register Co. v. Navy Cash-Register Co.*, 99 Fed., 565.

<sup>2</sup> *Clark v. Wooster*, 119 U. S., 322, 7 Sup. Ct. Rep., 217; *American Cable Ry. Co. v. Chicago City Ry. Co.*, 41 Fed., 522; *American Cable Ry. Co. v. Citizens Ry. Co.*, 44 Fed., 484; *Covert v. Travers Bros. Co.*, 96 Fed., 568; *Vaughn v. Central Pacific R. Co.*, 4 Sawy., 280.

<sup>3</sup> *Westinghouse v. Carpenter*, 43 Fed., 894.

peal has been taken from a preliminary injunction, the expiration of the patent pending such appeal terminates the operation of the injunction and the appeal should therefore be dismissed.<sup>4</sup> Although an article has become common property by reason of the expiration of the patent, yet where plaintiff has been manufacturing the article from patterns which he has prepared after great labor and has never published to the world, one who has surreptitiously copied such patterns and is making the article from them will be enjoined.<sup>5</sup> But the part manufacture of a patented article during the life of the patent, which does not amount to an infringement, for the purpose of completing the article after its expiration will not be enjoined since what the defendant is doing does not and never will amount to an infringement.<sup>6</sup> But the provisions of the writ may be extended to an assignee of the defendant, who takes an assignment of defendant's right *pendente lite*, and with full knowledge of all the proceedings.<sup>7</sup>

§ 981 *b*. **Effect of expiration on right to accounting.** Upon the question of what becomes of the main action when the patent has expired after the filing of the bill, it is, of course, clear that if the injunction is the only relief sought, the bill must be dismissed upon the failure of the right to the injunction. Where, however, as is usually the case, the bill seeks an accounting as well as injunctive relief, the authorities are not uniform. Upon the one hand, it has been held that so long as the patent is in force at the time of the filing of the bill and a sufficient length of time intervenes before its expiration to enable the plaintiff, under the rules of the court, to apply for an interlocutory injunction, the bill

<sup>4</sup> Gamewell F. T. Co. v. Municipal Signal Co., 9 C. C. A., 450, 61 Fed., 208; Lockwood v. Wickes, 21 C. C. A., 257, 75 Fed., 118; National Folding B. & P. Co. v. Robertson, 44 C. C. A., 29, 104 Fed., 552.

<sup>5</sup> Tabor v. Hoffman, 118 N. Y., 30, 23 N. E., 12, 16 Am. St. Rep., 740.

<sup>6</sup> White v. Walbridge, 46 Fed., 526.

<sup>7</sup> Parkhurst v. Kinsman, 2 Blatch., 78.

should be retained for purposes of an accounting notwithstanding the expiration of the patent and the consequent failure of the right to the injunction. In such case, since the action is one which, in its inception, entitled the plaintiff to relief in equity, the mere fact that the patent has subsequently expired and has thus defeated the right to a part of the relief sought, will not operate to deprive the court of a jurisdiction which has once attached, and the court, having thus acquired jurisdiction by the filing of the bill, will retain it for all purposes and may accordingly grant relief by way of an accounting.<sup>8</sup> The rule as thus announced, being supported by the authority of the Supreme Court of the United States, must be regarded as firmly and definitely establishing the proper practice. It has nevertheless been held, upon a bill for an injunction and accounting, that where it appeared upon the face of the bill that the patent had expired after the commencement of the action, a demurrer should be sustained and the bill should accordingly be dismissed, there being no other special circumstances which would entitle plaintiff to equitable relief.<sup>9</sup>

§ 982. **Grounds of dissolution; account; appeal.** Where an injunction is granted against the infringement of a patent, and at the same time complainant is ordered to bring an action at law to test his rights, delay in proceeding at law will constitute sufficient ground for a dissolution of the injunc-

<sup>8</sup> *Clark v. Wooster*, 119 U. S., 322, 7 Sup. Ct. Rep., 217; *Beedle v. Bennett*, 122 U. S., 71, 7 Sup. Ct. Rep., 1090; *Busch v. Jones*, 184 U. S., 598, 22 Sup. Ct. Rep., 511; *Ross v. City of Ft. Wayne*, 11 C. C. A., 288, 63 Fed., 466. And see *Keyes v. Eureka Mining Co.*, 158 U. S., 152, 15 Sup. Ct. Rep., 772; *Westinghouse v. Carpenter*, 43 Fed., 894. *Chicago City Ry. Co.*, 41 Fed., 522; *American Cable Ry. Co. v. Citizens Ry. Co.*, 44 Fed., 484. And see *Russell v. Kern*, 16 C. C. A., 154, 69 Fed., 94. See also *Root v. Railway Co.*, 105 U. S., 189, where no injunction was sought but only relief by way of accounting and damages. See also *Covert v. Travers Bros. Co.*, 96 Fed., 568.

<sup>9</sup> *American Cable Ry. Co. v. Chi-*

tion, but defendants may still be required to keep an account after the dissolution.<sup>10</sup> And the court may, on sufficient cause shown, permit the injunction to be dissolved upon condition of defendants giving security to account to complainants if their right shall be established.<sup>11</sup> But a decree for an injunction in a patent cause, with a reference to a master to take an account of profits, is not considered a final decree from which an appeal will lie.<sup>12</sup>

§ 983. **Penalty for not marking patented articles; injunction upon the hearing.** The penalty imposed by act of Congress for not marking patented articles does not affect the right to an injunction to restrain an infringement.<sup>13</sup> Nor is complainant barred from asking an injunction upon the hearing because of his neglect to apply for the relief by an interlocutory motion, although such neglect will impose upon him the obligation of making out a clear and unexceptionable title at the hearing.<sup>14</sup>

§ 984. **Process not patented may be protected.** A process of manufacture may, under certain circumstances, be protected by injunction, although not the subject of a patent. Thus, where defendant, through breach of contract and in violation of confidence, has become possessed of a secret process of manufacture, he will be enjoined from making any use of the secret. Although complainant in such a case may not be entitled to protection in equity as against the public generally, his process not being patented, he is entitled to protection against the defendant who has obtained possession of his secret in violation of the contract of the person by whom it was communicated to defendant.<sup>15</sup>

<sup>10</sup> *Stevens v. Keating*, 2 Ph., 333.

<sup>13</sup> *Goodyear v. Allyn*, 6 Blatch.,

<sup>11</sup> *Brooks v. Bicknell*, 3 McLean, 250.

33; *S. C.*, 3 Fish., 374.

<sup>14</sup> *Bacon v. Spottiswoode*, 1 Beav.,

<sup>12</sup> *Barnard v. Gibson*, 7 How.,

282; *Buchanan v. Howland*, 5 Blatch., 151.

650; *Humiston v. Stainthorp*, 2 Wal., 106. And see, *post*. Subdivision III, chapter on Appeals.

<sup>15</sup> *Morrison v. Moat*, 9 Hare, 241;

§ 985. **When jurisdiction exercised over foreigners.** The jurisdiction of equity for the protection of patents is exercised over foreigners within the limits of the country granting the patent, as well as over its own subjects and citizens. And an injunction will be allowed to restrain the citizens of one nation from using machinery patented to the citizens of another, on board their ships within the harbors of the nation granting the patent.<sup>16</sup>

*Westervelt v. National Paper Co.*, 154 Ind., 673, 57 N. E., 552.

<sup>16</sup> *Caldwell v. Vanvlissengen*, 9 Hare, 415. The principles applicable to injunctions against the infringement of patents by foreigners within the jurisdiction of the government granting the patent are well set forth by the Vice Chancellor in this case, as follows: "I take the rule to be universal that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if in any case, when they are out of their own country, their rights are regulated and governed by their own laws, I take it to be, not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of determining such rights. \* \* \* Foreigners coming in this country are, as I apprehend, subject to actions for injuries done by them whilst here to the subjects of the crown. Why, then, are they not to be subject to actions for the injury done by their infringing upon the sole and exclusive right which I have shown to be granted in conformity with the laws and constitution of this

country? And if they are subject to such actions, why is not the power of this court, which is founded upon the insufficiency of the legal remedy, to be applied against them as well as against the subjects of the crown. It was said that the prohibitory words of the patent were addressed only to the subjects of the crown; but these prohibitory words are in aid of the grant and not in derogation of it; and they were probably introduced at a time when the prohibition of the crown could be enforced personally against parties who ventured to disobey it. The language of this part of the patent, therefore, does not appear to me to alter the case. \* \* \* In the argument on the part of the defendants much was said on the hardship of this court's interfering against them, and upon the inconvenience which would result from it; and some reference was made to the policy of this country; but it must be remembered that British ships certainly can not use this invention without the license of the patentees, and the burthens incident to such a license; and foreigners can not, I think, justly complain that their ships are not



§ 986. **Violation; infringement not determined in contempt proceeding; judgment imposing fine, being criminal, is reviewable by writ of error.** One who has been enjoined from the infringement of a patent violates the mandate of the court by using a machine which in substance and principle contains important portions of the patent, although in other respects it may contain new and improved features. So if he uses another patent, similar in principle, the author of which has also been enjoined by the owner of the first patent, he is guilty of a contempt of court.<sup>17</sup> And a defendant who has been enjoined from infringing by the manufacture and sale of the article, is equally guilty of a violation of the writ, whether he sells in his own right or as the agent of another.<sup>18</sup> So working for wages in a shop or factory, where articles are manufactured infringing on complainant's patent, is a violation of the injunction, if done by one on whom the writ was served, and will be punished

permitted to enjoy, without license and without payment, advantages which the ships of this country can not enjoy otherwise than under license and upon payment. It must be remembered that foreigners may take out patents in this country, and thus secure to themselves the exclusive use of their inventions within Her Majesty's dominions; and that, if they neglect to do so, they, to this extent, withhold their invention from the subjects of this country. It is to be observed, also, that the enforcement of the exclusive right under a patent does not take away from foreigners any privilege which they ever enjoyed in this country; for, if the invention was used by them in this country before the granting of the patent, the patent, I apprehend,

would be invalid. One principal ground of inconvenience suggested was, that if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions; but I think this argument resolves itself into a question of national policy, and it is for the legislature, and not for the courts, to deal with that question; my duty is to administer the law and not to make it. Upon the grounds which I have referred to, I think that the facts stated in the affidavits and answer do not furnish sufficient grounds for refusing these injunctions."

<sup>17</sup> Woodworth v. Rogers, 3 Woodb. & M., 135.

<sup>18</sup> Potter v. Muller, 2 Fish., 631.

by attachment.<sup>19</sup> And in case of a wilful violation of an injunction against the infringement of a patent, it is proper for the court, on motion for an attachment against defendant, to impose upon him the payment of such counsel fees and disbursements as were necessary to establish the violation of the injunction.<sup>20</sup> And it has been held that where, after the granting of an injunction against infringement, defendant has made additions to the infringing device, the question whether the device as thus modified constitutes an infringement can not be determined in a motion for attachment for contempt but must be raised by supplemental bill in the original cause or by new suit.<sup>21</sup> The imposition of a fine for the violation of an injunction where the contempt proceedings are heard upon motion entirely disconnected with the proceeding in which the injunction was granted, is a judgment in a criminal cause and, as such, is reviewable by writ of error and not by appeal.<sup>22</sup>

§ 987. **Account not incidental to injunction.** The jurisdiction of the United States courts in this class of cases being derived wholly from statute, the English rule that the account is strictly incident to the injunction, and that where an injunction is refused an account will be denied, is not applicable in this country.<sup>23</sup> And if the patent has expired between the time of filing the bill and the hearing, the court may direct an account, although no injunction will be allowed against the future use of the article.<sup>24</sup>

<sup>19</sup> *Goodyear v. Mullee*, 5 Blatch., 366, 67 Fed., 163. And see, *post*, § 1466.  
<sup>20</sup> *Doubleday v. Sherman*, 4 Fish., 253.

<sup>21</sup> *Enterprise Mfg. Co. v. Sargent*, 48 Fed., 453. And see *Allis v. Stowell*, 15 Fed., 242.

<sup>22</sup> *Gould v. Sessions*, 14 C. C. A., 381 b.

<sup>23</sup> *Sickles v. Gloucester Manufacturing Co.*, 1 Fish., 222.

<sup>24</sup> *Imlay v. Norwich & W. R. Co.*, 4 Blatch., 227. And see, *ante*, § 981 b.



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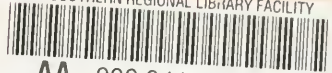
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